NOTICES

RESPECTING

SOME OF THE SUITS

AND

MISCELLANEOUS PROCEEDINGS

MOST COMMONLY ADJUDICATED IN

The Zillah Courts of Bengal.



BY

MOOLAVIE MAHOMMED BAKUR,

VAKEEL OF THE ZILLAH COURT OF FERAIZPORE.



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Dedicatory and Introductory Letter.

To CHARLES MACSWEEN, Esq.

Secretary to Government in the Judicial and Revenue Departments.

Sir,

I had nearly abandoned the intention of submitting to the eye of the public, the following "*notices respecting some of the suits, and miscellaneous proceedings most commonly adjudicated in the Zillah Courts of Bengal,*" which were drawn up some two years since, when my attention was again attracted to the subject by observing in the daily prints the talented communications of Indophilus, Philalethes, A Friend to India, Alfred, Stubbs, Sundry Ghosts, an Indian Perwannah, *cum multis aliis,* whom the administration of Lord William Bentinck has called into existence. It appeared to me, that it was desirable to seize the favourable opportunity—when discussion was rife—while whole armies of talent were taking the field either for or against existing institutions—marshalled, one under the banners of Cornwallis, a second, led on by Munro—of publishing my Treatise, elementary and imperfect as it is.

My hope, as expressed in the Preliminary Remarks to Chapter I.*, is to draw the attention of more able men to

* See page 13.

the subject, and thus to ensure its treatment in a more masterly and comprehensive manner; and my favourite object, is *the enactment of an Uniform Body of Local and Regulation Law for the Provinces**. The same subject has been most ably, most eloquently, most conclusively advocated by a Friend to India in his twentieth letter†, and formerly by a gentleman of known talent at present residing in Calcutta, who in the opinion of a Friend to India advanced reasons and arguments sufficient to have induced those in power to bestow attention upon it—I pray that something of the kind may be attempted under the present Government: the labour of two or three of its servants might well be spared to carry it into effect—it is not, as a Friend to India remarks, required to construct laws *de novo*;—the grand desiderata are *Classification*, *Revision*, and *Consolidation*.

Permit me in this place to indite a *Paper of Hints* regarding the formation of the Code of Law so much required—wherein it will be found to be considered on a more enlarged scale than in the Preliminary Remarks to my first chapter.

It is in the first place of importance to consider of what the Code shall consist—into how many Divisions it shall be classed.

I. *A first necessary division* will embrace the Mahommedan and Hindu Laws, as laid down by the most approved commentators. On this Head it would not be required that Government should go further than the Principles and Pre-

* See page 11.

† See the *India Gazette* of July 23rd, 1833.

cedents of both codes, as compiled by Mr. William Hay Macnaghten. In some few instances it will be observed that there are differences existing between the Hindu schools of Bengal, Benares, and Tirhoot.—These variations might still be permitted to continue, and specific provisions made to that effect. But questions of a *general* as contradistinguished from those of a special or *local* nature—such as, the liability to sale and transfer of ancestral real property, the limit of time for preferring a claim to the right of Shafia or Pre-emption, &c. &c. must after due consideration be set at rest, and made *into Law* by statutory enactment. Now I have elsewhere* termed the Hindu and Mahommedan Laws, *the Common Law* of the country, as contradistinguished from the *Regulation or Statute Law*; though, if made *determinate*, consolidated, and *re-enacted* in the manner proposed, it is clear that its character of *Common*, would be *merged* into that of *Statute*, Law of the Realm.

II. Now the first division being confined to abstract questions of Mahommedan and Hindu Law exclusively, *a second* will embrace *points of civil justice in general*, of the description of those noticed in my first chapter, as influenced by the Regulations, and by the English Law of Contracts and of Evidence, comprising in consolidation with it, the dicta of the judges and the constructions of the courts, which may upon due consideration appear consonant with Justice, and worthy of incorporation with the uniform code under discussion.

III. A third principal division, absolutely necessary to the formation of an uniform Civil Code, will consist of the *Revenue Regulation Law as connected with judicial matters.*

* See page 3.

This should be consolidated and improved, information being taken from revenue suits decided. How is kheraj property under butwara? How affected as regards the decision of suits and the payment of the revenue? How under sale? What effect on the Sudderi and Shikmee tenures? how differently influenced by private and public purchase? In fact, this division will embrace a succinct and useful history of an estate settled in perpetuity.

IV. To the above should be superadded in a *fourth Head*, the general rules of the English Law, or of the most approved European systems, in the matter of *Evidence* and *Contracts*. And

V. The Law of Process, which is almost exclusively a Regulation Law, will be comprised under a *fifth* grand division of the subject, embracing the jurisdiction of the courts, form of pleadings, defences—procedure, execution, and costs.

Having thus endeavoured to state *in the first place* of what the code shall consist, and into how many divisions it shall be classed, it remains to offer some observations, *in the second place*, on the best means of acquiring the necessary information, and taking the sense of our native subjects as to the propriety of the laws proposed.

Before promulgating the code it should be transmitted to all the districts, in order to ascertain how far its provisions are in accordance with the law as received and practised in each Zillah, and in order to be informed if there exist any particular local customs which it is requisite to *determine* and *interweave* with the uniform body of law. The judicial and revenue functionaries, the law officers, Serishtah-

dars, Cazis, Moonsiffs and Vakeels, should be required to give their opinions—and as Government officers are, from the hope of pleasing their superiors, apt too readily to coincide in the expediency of proposed enactments, it would also be advisable to take the sense of each district generally, by an assemblage of city and thanah deputies. Eight for the larger, and four for the smaller cities, and two for each thanah—to be elected by the district, and to sit in deliberation on the measures proposed. For the rest—the records, decisions, constructions, and existing Regulations will afford ample materials and guides for the drawing up of the II. III. and V. divisions ; and in order to obtain the IV. or, *a Law of Evidence and Contracts*, either one of the judges or talented barristers of the Supreme Court might be requested to compile it, always keeping in view the Mahommedan and Hindu codes, amalgamating them with his precis, where they may appear accordant with justice, and preserving them in cases, as in the evidence of females, where they could not be abolished without violating the religious prejudices of my countrymen.

Divers Regulations tending to very considerable improvement in the departments over which you preside, have been enacted, or at the present moment are under consideration.

Need I mention the assistance which judges have received in arriving at an issue in civil suits, by the appointment of punchayets, juries, and assessors—the limitation which has been so properly fixed to appeals—and numerous other beneficial alterations promulgated since this Treatise was compiled—And how just were the views which I entertained in respect to the necessity of a speedy determination of the

validity or otherwise of lakheraj grants* has been proved by the fact that a plan is at present before council which, I believe, emanated from yourself, by which that most desirable object will be attained. The letters of Philalethes present a complete history of the resumption Regulations and of our revenue system generallv, and though I do not concur in all the views and *statements* of that talented officer, yet I cannot fail to admire the ability and address with which he has urged them—As however the statement exhibited in his fourth letter† would seem to show that the average of suits decided in favour of Government is not so great as some remarks of mine would insinuate, it behoves me at once to make the *amende* honourable for the obnoxious paragraph‡. Suffice it to say, that it was written during the excited feeling of the moment, when our family grant of rent-free land, for services performed in the time of the high and mighty Emperor Aurungzebe, Allah rest his soul, was declared by the collector of Feraizpore liable to resumption, under what appeared *to us* rather a forced construction of Regulation XIV. of 1825. Philalethes too endeavours to prove in that same letter, that the value of estates sold by public auction has not decreased in consequence of the passing of the resumption Regulations§. The averages however which he adduces show, " that the relation of price to jumma was highest from 1819-20 to 1822-23, *in spite of Regulation II. of* 1819." True, the price did not fall at that period, be-

* See pages 69 *et seq.*

† *Bengal Hurkaru,* July 19th, 1833. Paragraph 10 of the letter.

‡ See page 75—according to Philalethes; of cases decided by Collectors from August 1830, to January 1833—1671½ were in favour of Government—628½ in favour of individuals.

§ See paragraph 13.

cause it was never supposed that the provisions of the Regulation would have been enforced—Had the law of 1793 been properly and forcibly acted upon ? Did it not sleep a *lex mortua*, as is too frequently the case with our Regulations ? and it was supposed that the enactment of 1819 would lie in like manner unheeded and forgotten.—But no—the determination of Government to interfere in lakheraj tenures has of late years been boldly and explicitly manifested—first came the *celebrated* enactment of 1825, and then the "*last sweeping*" Regulation of 1828—since which the sale price of land *has fallen*.—Now I attach no importance at all to the fact, that the average is *very considerably higher* from 1828-9 to 1831-2, than from 1808-9 to 1811-12. Were I so to do, I should pay but a poor compliment to the Company's administration. At that early date the measure of the prosperity of the country was but partially filled—the machinery of our revenue system had not yet learned to work in a smooth and uniform course—our institutions, nay, our very existence had not long been firmly established—accordingly the value of landed property has gradually increased since 1809, (and returns would, I have no doubt, prove the same since 1793,) until 1823, and would have continued to increase up to the present date had not the *animus* of Government to interfere with lakheraj, and generally with all lands, not assessed in 1793, though claimed by Sudder Malguzars as included in their decennial settlement estates, been so strongly demonstrated. I have held *Moktearnamahs* in a mofussil collectorship, and I state as a fact that Sudder Malguzarry property has of late years declined in value—and I aver most particularly that difficulties have been thrown in the way of transfers of shikmee property, and great injustice and hardship and depreciation caused by the operation of section 30, Regulation II. of 1819.

To return to the plan for the adjustment of lakheraj claims generally. The officers entrusted with the duty should have combined in them full collectorial and judicial jurisdiction—they should be armed with *a plenipotentiary discretion*. Their labours should be confined to one district only in the first instance.—They should be confided in and encouraged by the supreme power—and here I must again differ with my esteemed and talented friend, Philalethes.—What is his method of treatment to public officers? "*Jealous supervision*," says he, "and *personal responsibility resolutely and consistently enforced by Government**." This language appears to me ill calculated to procure a willing co-operation in the views and orders of superior authority. Too jealous a supervision—a lack of confidence in the subordinates—is a vital defect of the system. This government, I fear of necessity, is a suspicious, a distrustful Government. A collector, satisfied of the truth of a petition for abatement, recommends that its prayer be complied with—it is deemed advisable by the local officer to give up *irrecoverable balances*, in order to secure *future punctual realization*. The estate of A has suffered by alluvion, a diminution of his jummah is declared to be necessary and just—it is recommended to compromise the claims of lakherajdars—woe to the character of that man, who submits to superior authority a measure by which the loss of a single rupee of revenue will be incurred—an over-easiness of disposition, nay *worse motives* are ascribed to him,—the Company's servants are *afraid of being just*. I allude again to this important defect of the system, because I am convinced that if the Resumption Plan be to be carried into effect, it will be necessary that extreme confidence and discretion be reposed in the officers entrusted with its execution—not that

* See his 5th Letter—Hurkaru, July 26th, 1833.

all their official acts should be suspected, that checks upon checks should be multiplied, and that they should be amerced in damages and costs !!!

It is reported too that Regulation VII. of 1822, is shortly to undergo a revision. Has the mistake of interfering too minutely with the under-tenures—of raising up rights which existed only in idea—been at last discovered? The rights of those under-tenants only which are prescriptive, determinate, and ascertained, shall in future be recorded.

In the Preliminary Remarks to my Second Chapter* I have noticed the expediency of blending together the judicial and revenue jurisdictions—The magisterial should be kept *entirely distinct*, and be entrusted to the management of one officer. Let us see what number of functionaries would be required under this arrangement;—*first—in the Police Department*—one magistrate—with European and Native assistants in proportion to the laborious duties of the district—(in few instances would more than one covenanted assistant be required). One Circuit Court—One Nizamut Adawlut—the Circuit Court being relieved of all civil duty, need not consist of more than two officers—and, *secondly, in the Judicial (Civil) and Revenue Department*—one officer with full judicial and collectorial jurisdiction, call him by whatever name you will—supported by one *assistant judge and collector*, or two if requisite, who would carry on the current detail of the collectorate, and also be employed in the civil court—one Sudder Dewanny Adawlut and Board of Revenue—and as to native agency under this head, I would curtail it in the civil, and increase it considerably in the revenue department, as is, I believe, in contemplation.

* See Pages 65—66.

For the rest—many are the blessings—numerous are the improvements—which have been bestowed upon us during the Bentinck administration—but they have not been unaccompanied by inconveniences. The junction of the magisterial and revenue jurisdictions is by no means an improvement in my humble estimation—the natives have been too extensively empowered in the adjudication of civil suits—the changes have been too frequent, and have followed each other in too rapid succession.

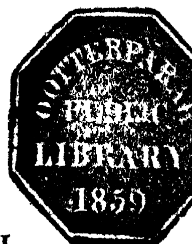
—— Ut unda impellitur undâ
Urgeturque prior venienti—

So that, before the country has had time to recover from the effects of one billow, it has speedily been overwhelmed by the effects of a second inundation.

In conclusion, permit me to acquaint you with the reasons which have induced me to take so great a liberty with your name—I have treated of judicial and revenue matters of which you hold the portfolio. I am aware too, that though anxious to keep pace with the improving spirit of the age, all reforms and suggestions emanating from you, are tempered with extreme judgment, and a desire of not departing too suddenly from the system established in 1793; and in the hope that such may long continue the rule of your public conduct,

I have the honour to subscribe myself,
Your most obedient and humble servant,
MOOLAVIE MAHOMMED BAKUR.

Feraizpore, August 1st, 1833.



PRELIMINARY REMARKS TO CHAPTER I.

NATURE of the work, and acknowledgments to Messrs. Macnaghten, Prinsep, and Smyth. Of the sources of administering justice in the Company's possessions, being, 1, the Common Law, 2, the Regulation Law, and 3, the Dicta of the Judges. Probable changes in the judicial system; and 1st, as to raising the qualifications of the European Judges; 2ndly, diminishing the stages of appeal; 3rdly, constructing an uniform Code of Laws. How to arrive at an adjudication generally in civil suits, being, 1st, by obtaining an issue; 2ndly, by deciding on that issue; which may be either, 1st, by evidence of witnesses; or 2ndly, by evidence of documents; or 3rdly, by evidence of circumstances—and concluding Remarks.

In the Name of the Most Merciful GOD.

Having been enabled, through the spread of intellect, to acquire some of the rudiments of an English education, and having practised for some years as a Zillah pleader, under the provisions of Regulation XXVII. of 1814, I, Moolavie Mahommed Bakur, have endeavoured, during the temporary leisure afforded by the Mohurrum and Dasarah vacations, to put together in this treatise some of the particulars relative to the actions most commonly adjudicated in the

Zillah Courts of Bengal. Avoiding the more lengthy and intricate questions appertaining to the Mahommedan and Hindu Laws, (the Principles and Precedents of which have been laid down by our books, and likewise by English commentators, especially by the learned Civilian Mr. William Hay Macnaghten,) I have refrained from speaking, unless incidentally, of inheritance, partition, adoption, and the like; selecting, after the bent of my education, those suits partaking more nearly of an English, or perhaps I should say, a regulation character, and superadding, in cases wherein it may appear applicable and useful, the substance of the native codes, and general principles of the law of the mother-country.

Nor can I proceed further, without acknowledging the very great assistance which I have received from the masterly works of Mr. Macnaghten, in which the Principles and Precedents of the Hindu and Mahommedan Laws have been so clearly laid down, that I have chosen to abstract from them in preference to the works of my own countrymen; and from the laborious performance of the late Mr. Augustus Prinsep, on the authority of which I have in places quoted the Regulation Law, and to parts of which the order and arrangement of subjects in this treatise, particularly in the third chapter, though conceived before the appearance of Mr. Prinsep's work, will be found to bear some resemblance; and from the very

useful publications of Mr. Smyth, of Hooghly. It was my good fortune in early youth to plead for a short term in the court of the latter gentleman. I had thus an opportunity of admiring his intimate acquaintance with the laws and regulations, and the zeal and ability with which he administered them.

The sources, as they are at present constituted, of administering justice in the Company's possessions, may be said to be,

1*st*. The Hindu and Mahommedan Laws, which may be termed the Common Law of the country, though both *scripta* and *non-scripta*, either written, or unwritten, being based upon local custom.

Secondly. The Regulations of the Honorable Company, which I may denominate by way of contradistinction the *Lex scripta*, the written or Statute Law—but this has reference almost exclusively to the conduct and process of civil actions. The Common Law itself has not been altered by it, excepting in a few instances, such as conditional sales on mortgage, time of minority, succession, and administration to estates; or in matters connected with the tenures created by the system of the perpetual settlement—though the Common and Local Law of the country has sometimes been consolidated and re-enacted by it, with the addition of Foreign Law,

when deemed advisable; as in the case of Alluvion and Dereliction, which I have noticed in the ninth head of my second chapter.

Thirdly. And a third source may be said to be the decisions of the several courts, and the *dicta* of the judges, and these constitute a very great portion of the law which is daily administered in England in civil cases. "The doctrine," says Blackstone*, "of the law is this, that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. It is a maxim of the Civil Law, "Non omnium quæ a majoribus constituta sunt ratio reddi potest, et ideo rationes eorum qui constituuntur inquiri non oportet; alioquin, multa ex his quæ certa sunt, subvertuntur." Without going quite so far as the learned commentator, for such would never be permitted in these days of subversion and revolution, we may take it as a general rule, that the decisions of our courts are evidence of what is law.

In the present age of change and improvement, however, it is impossible to calculate on the permanency of that law, or of these regulations, by which the provinces are governed:—in short, on the duration

* Volume i. page 70.

of the judicial system, both statutory and executive. These matters have been ably discussed by Mr. Miller, in a pamphlet on the Administration of Justice in the East Indies*, and from amongst the subjects treated of by that gentleman, I shall select as of most importance, and in order to a few observations in this place, the following, viz. 1, the propriety of raising the qualifications of the European judges; 2, of diminishing the stages of appeal; 3, of preparing a digest of law for the different portions of the Company's territories. And,

I. *First.* As to raising the qualifications of the European judges. Two points do not require to be commented upon.

1*st.* It seems to be agreed on all hands, that no government in ancient or modern times has produced a greater assemblage of meritorious servants.

2*ndly.* The anomalous situation in which they are placed would appear to be in like manner conceded. Endowed for the most part with liberal education, in few instances have they gained more than an insight into the general tendency of English law. Involved at once in the constant and laborious routine of office, a considerable time elapses before they can possibly, if at all, acquire an intimate acquaint-

* Published in London, 1828.

ance with the laws and institutions of the country. Their experience, in a word, must be obtained at the expense of the people whom they are called upon to govern. It is recommended by Mr. Miller, that the young men intended for the judicial department should pass through a stricter ordeal of examination, and at a later period of life. Sir Edward Hyde East likewise, in the important evidence given by him before the House of Lords in 1830*, recommends the introduction of English pleaders into the Mofussil courts, in addition to the native Vakeels, "either by the allotment at once of a certain number of barristers to the several courts throughout the country, according to the exigency of the case: and in favour of their present servants in the judicial line, the Local Government might be restrained from the appointment of any of those barristers to judicial situations in the principal courts for a certain number of years, after which they should be eligible." Yet in the opinion of Sir Edward, the immediate introduction of a few experienced and approved barristers into the judicial seats of the Zillah courts, where there is the greatest press of business, would be of public advantage. "Or, by selecting from the writers such as are intended for the judicial department, and requiring them to attend for a certain time the sittings of the courts, at the end of which

* Evidence before Select Committee of the House of Lords, 1830.

to call to the bar some, and to admit others as solicitors and attornies of the Mofussil courts, filling from the former all vacancies in the judicial seats of the country." Sir Thomas Strange likewise, though he thinks it by no means advisable to extend the jurisdiction of the Supreme Court into the interior, yet considers it a desideratum that the king should have some share in the administration of justice in the provinces as well as the presidencies; and recommends the introduction of a royal judge, as chief of the Provincial Courts, and president of the Sudder Adawlut, opening the said Sudder to counsel, which might thus be made a useful school of law, and preparative to the judges of the Company. Something must be done, and will shortly be done. I am given to understand, (and beg pardon, if I err, from my limited acquaintance with European politics,) that the gentlemen who compose the present administration are fond of change, aiders and abetters of the march of intellect, joining in the cry of Reform, and apt to be decided arbitrio popularis auræ. Now the people have called for the abolition of the Company's charter, they have called for a remodelling of the administration of justice: what likelihood is there then, that either the one or the other will be permitted to continue? Reform then we must have:—the only question is, in what shape shall it be introduced. That proposed by the learned judge Sir Thomas Strange appears to me to be conceived in great moderation, and

with a due respect to the Company's servants and charter, but will a divisum imperium of the nature suggested be found to answer? How would such materials amalgamate and pull together? Judges of different ideas and qualifications—it would be impossible to provide against divisions of the bench, against jealousies and misconceptions Again, as to the propositions of the judge first adverted to, were it determined that either of his suggestions should be adopted, my vote would certainly be in favour of that which recommends a selection from the Civil Servants, with a view to their acquiring a stricter legal education. I had rather that the present materials be improved, than that new ones be introduced. Though myself belonging to the profession, I am no friend to barristers, either native or English. I think that could the files in the several Zillah courts be once reduced, and sufficient leisure allowed to the judge to hear causes *viva voce*, it would tend much to the administering of that summary and decisive justice, so well adapted to the habits of my countrymen, if that branch of assisting procedure, denominated Vakeels, were dispensed with altogether. But certainly it would be beneficial more strictly to superintend the training of the Civil Servants after their arrival in India, not with a view to their becoming barristers and attornies, but to their filling the situations of Judges and Collectors The proposition that they should attend the sittings of the Supreme

Court and Sudder Dewanny Adawlut appears well calculated to answer the object proposed. Either in this manner, or as a part of their college education, they should be familiarized with the various documents, with the nature of the contracts and plaints usually brought *sub lite*, with the pleadings and defences generally advanced. They should be made acquainted with the tenour of our law engagements, with Izarah-namahs, Grivi-namahs, and all the numerous class of deeds and conveyances; and, as has been justly observed by Sir Edward Hyde East, with the English law of evidence and contracts.

II. As to diminishing the stages of appeal. As the qualifications of the judges are raised, so it would be found practicable to reduce the stages of appeal. The facility of appeal is founded, to use the words of Lord Hastings, on a most laudable principle of securing by double and treble checks the proper decision of all suits; but the Utopian idea, in its attempt to prevent individual injury from a wrong decision, has been productive of general injustice, by withholding redress; and general inconvenience, by perpetuating litigation. The peace of society and the general welfare of the state are less concerned, that questions of *meum* and *tuum* should be well decided, than that the ground of contention should cease. The opinion of Mr. Secretary Dowdeswell, to the same

effect, is also quoted by Mr. Miller*. The allowance of appeal upon appeal has been granted, I apprehend, because of distrust of the inferior courts; let a limit be affixed to it by legislative enactment; this might be done with more confidence, consequent on the stricter training of the judges to which we have adverted: at any rate the experiment might be tried in some districts, where it is known to the Government that they possess servants of talent and integrity. A point of civil justice, is only capable of being adjudicated one way; that is, the right way—if it depend upon evidence or the general merits, though the judge may arrive at an erroneous conclusion in estimating the force of that evidence or the value of those merits. But in points of law, a difference of opinion may sometimes occur; in other words, there may be room for two decisions or two constructions of the same text, without either judge compromising his talent or integrity. Now only in particular cases, to be certified by the judge himself, would I allow even of a first appeal. At present all is distrust and suspicion. Were greater confidence reposed in him, the judge would be more careful in deciding, and more ready to re-hear or to certify. I think too, that a greater facility and discretion in re-hearing causes should be allowed to judicial officers. In lieu of reporting that revision is necessary, to the

* Page 102.

Court of Sudder Dewanny Adawlut, as required by Section 4, Regulation XXVI. of 1814, it would be sufficient, in my humble opinion, merely to record the reason for so doing, whether new matters or evidence be brought forward or not, and to notice any causes reviewed in the monthly reports.

III. As to an uniform Code of Law for the Company's territories. I do not think that an uniform Code of Mahommedan and Hindu Law is so much required, as of the Law of Practice—of the Regulation Law, as modified and influenced by the English method of evidence, of contracts, of procedure, embracing, in particular cases, the local customs of the provinces. The former has been supplied by the Principles and Precedents of Mr. Macnaghten; in the latter a wide field remains open for uniformity and consolidation. We have indeed the *dicta* of our judges, but not many that could be relied upon, or that could be made the basis of an uniform body of law. I regret to be obliged to remark, that at present the decision of one judge is regulated by one principle; that of his neighbour, by a principle diametrically opposite. It is true that this evil has been in part corrected by the published reports of the Sudder Dewanny Adawlut; but these do not embrace many points of local District Law, and do not give an account of divers actions commenced in that *officina justitiæ* the Zillah Court, but which may not have reached in appeal, or have

been brought to the notice of, the highest court, by reference made, or Futwa demanded. For instance—what are called Niric cases are very common in Burdwan. Now how are those Nirics, or the rate of rent payable by the under tenantry, ascertained and decided? is it by measurement of the lands, or by immemorial usage, or by striking an average, or by evidence oral or documental?—how is the conduct of the suit influenced by the landed tenures of the country, or by the Statute Law of the Company? Now I say, that a history of some of the suits of most common occurrence, embracing such particulars as those above adverted to, would form a most useful addition to the library of every Indian judge; would tend to the consolidation of the Law of Practice and of the Regulation Law; would form the rallying point, the landmark, the materials, for that uniform code of law so much required.

The ruling power has great facilities for collecting any information of the kind, either separately, from each judicial and revenue officer—or in the aggregate, by the appointment of such an officer as that of the Superintendent and Remembrancer of Legal Affairs, recently abolished—or by means of a travelling commission, armed with authority to examine the records and consult the judges as to their *dicta*, and the nature of the actions which prevail in their several jurisdictions. I most earnestly recommend to the Right

Honorable the Governor General, the adoption of some measure of the kind. The following pages, it is true, were intended to give an account of some of the suits most usually brought to trial; but I am so sensible of their defects, that I can only hope by their publication to draw the attention of more able men to the subject, and thus insure its treatment in a more masterly and comprehensive manner.

Premising, that in the chapter ensuing, I have selected, as far as the nature of the subject would permit, those suits appertaining more nearly to points of *Civil justice*, as contradistinguished from actions having reference to land and its revenue; I shall proceed to offer in this place a few observations on the manner of arriving at an adjudication in suits generally. Now in order to this, it is necessary,

1*st*. To obtain an issue.

2*ndly*. To decide on that issue.

And 1st. The rules contained in the excellent code of 1793 could not have been better calculated for preventing a departure from the immediate points at issue. But they are not always fully acted up to*. The plead-

* See Section 5, Regulation IV. of 1793; also Circular Order of August 7th, 1817, in which particular attention is directed to a strict observance of Regulation XXVI. of 1814, especially Section 10.

ings are not sufficiently restricted; irrelevant matters are permitted to be introduced; distinction is not made between pleas special and pleas to the general issue; and the barristers on either side run wild into an untrodden path of litigation, until the judge is lost in the labyrinth.

2ndly. As to the deciding on the issue, if it can be obtained. Now this may be,

1*st.* By evidence of witnesses.

These, I regret to say, can seldom be relied upon. The judges have not always leisure carefully to superintend the examination in chief—while cross-examination is freqnently carried so far by judicial functionaries, that they end in confusing both themselves and the witnesses*. Cross-examination is only required, when the first evidence is incomplete in its information, or carries upon the face of it fair grounds for suspecting the credit of the witness—also when witnesses coincide exactly in their testimony, it is considered by our courts as a proof of the correctness of the transaction to which they speak. Let me however ask, Is it not a greater proof of correctness, if they speak to the same general fact, but with slight variations in their evidence? Certainly, when we

* This evil prevails to a much greater extent in Foujdarry investigations.

consider the different degrees of retentiveness of memory which individuals possess—the different lights in which the same action and transaction may be viewed or considered by persons beholding it, or present at the same time—it does appear to me more reasonable to expect agreement as to the general fact, but variation in the detail; and to conclude, that such bears greater evidence of truth upon the face of it. "A difference between witnesses on points of little importance affords no reason to suspect their veracity. A difference in the manner of relating unimportant circumstances is perfectly natural, and what might be expected in the ordinary course of things; on the contrary it is the exact coincidence in minute particulars that shows contrivance and excites suspicion*." I allude particularly to this matter, because it is so frequently the practice in our courts to present the evidences to the judge agreeing verbatim et literatim.

2ndly. By evidence of documents. These too require to be closely scrutinised by the court, particularly evidence of Zemindarry claims and accounts, or relating to the payment of revenue, or proving the quantum of right possessed by Sudder Malguzars, or under-tenants. At the same time, it is observable, that "written accounts are more easily proved than words—a written account is shown to be authentic by proof of the hand-writing, but the authenticity

* Phillip's Law of Evidence, p. 164.

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of mere oral declarations must be regulated by the memory and accuracy of the witness who undertakes to repeat them*." And,

3rdly. By evidence of circumstances, if I may so term it. Neither witnesses nor documents being fully to be relied upon, the judge will find it necessary to select other circumstances upon which to base his judgment pro or con. He will cast his eye over the general complexion of the case; he will observe some document with a slight flaw in it, or some testimony or pleading containing a statement, laboured or improbable, or at variance with something asserted or pleaded before. He will remark some variation in the dates specified, in the stamp used, in the residence or appointment of the vender: and this is what I term the evidence of circumstances, the judge being necessitated by reason of faulty documents or unsatisfactory evidence to call to his aid the assistance of other minute particulars and circumstances in which he cannot be mistaken, in order that the scale of justice may thereby be weighed down in favour of either party. "As mathematical or absolute certainty is seldom to be attained in human affairs, reason and public utility require that judges and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior num-

* Garde's Law of Evidence, p. 42. An excellent work.

ber of probabilities on the one side or the other*." I own I am sufficiently a Benthamite to recommend the above, and every other possible method (even though not according with the precise and delicate rules of English law) of arriving at justice and right; but regret that I should be constrained to admit that the scales of justice are, with us, suspended on so nice and tender a balance, that the addition of a feather, or in other words, of one of the particles of probability, on either side, is frequently sufficient to cast a preponderating influence on the merits of the question.

In conclusion, I think it would be advantageous to direct each judicial officer, to forward, with his monthly statements, a note of the pleadings and evidence, with the reasons of his judgment in each suit decided†. In districts too where there is a great arrear of business, the deputation of extra judicial officers would be a merciful and a saving measure in the end. Certainly, the judicial system has been far from successful. Let us return, if possible, to that speedy and decisive method of administering justice so well calculated to prevent litigation, and so well adapted to the charac-

* Lord Mansfield, in the Douglas case, cited in Andrew Stewart's 3rd letter, and quoted in Garde's Law of Evidence, p. 28.

† I observed this suggestion likewise offered by a writer in the Bengal Hurkaru.

ter of the people : let the files be cleared, and the courts and collectorates thoroughly purged. Reforms and changes might then with safety be tried. But until the Augæan stable be cleansed, it appears to me to be absolutely dangerous to hazard any experiments, lest during the operation of tacking, the vessel of the state, being lumbered in her movements, and incapable of being worked, should sink to rise no more.

CHAPTER I.

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I. Actions on Tamassoks or bonds, which are denominated by the English Law, *deeds or specialties*; written contracts, stamped, witnessed, and executed with all the formality of the law. In treating of which, I will, *first*, state the different descriptions of bond upon which action is generally brought; *secondly*, observe on the concomitants and proofs required by regulation, and the constructions adopted by our courts; and *thirdly*, recount the pleas usually advanced on the part of defendants.

1. Bonds may be *of simple debt without interest.* No interest being stipulated in the instrument between the contracting parties, it is not therefore usual to decree it—that is to say, as far as relates to the term specified by the bond : but the plaintiff will be entitled to the legal interest for any period beyond that stipulated, during which defendant may retain illegal possession of the sum borrowed.

2. Bonds may be *of simple debts bearing interest,* which is now generally specified at 12 per cent. per annum, the rate fixed by clause 4, Section 3, Regulation XV. of 1793.

3. Money is frequently borrowed *on bond on paddy, cloth, or other goods ;* the tenour of the agreement being this, that should A fail to pay the amount lent, he will be liable to B for so many bushels of paddy, or pieces of cloth : and this species of transaction is common amongst Mahomedans, who are forbidden by their law to take interest, but is clearly nevertheless nothing better than an usurious contract, calculated and intended to obtain at least the legal, if not an excess of the legal, interest. It is most expedient in my opinion, in deciding these suits, to decree an amount equivalent to the principal and legal interest ; to adjudge the article itself would raise up difficulties in the way of execution.

4. A fourth description of bond is where money is borrowed *on the security of the title-deeds of landed property* ; in which case, it is generally stipulated that the creditor in default of payment shall proceed to the sale of the property, the title-deeds of which have been lodged with him; on action brought, however, it is usual to decree the principal sum lent, with interest, leaving it to the plaintiff to proceed against the said landed property in course of execution.

II. By Section 15, Regulation III. of 1793, it is required, that Tamassoks be proved to have been executed in the presence of two witnesses, or that the payment of the money or valuable consideration be established*: and with advertence to the constructions of our courts, it is important to remark under this head; 1st, that the inferior courts have now

* The English Law of Evidence is different in this respect: "If a deed is attested by several subscribing witnesses, the execution may be established by one of them, or if none of those witnesses can be brought forward, evidence of the signature of the deed by one witness is enough. For the purpose of proving hand-writing, it is not requisite in the first place to call the supposed writer himself; the testimony of persons well acquainted with the general character of his writing, who on looking at the paper can say that they are of opinion it is his hand-writing, is of itself sufficient—but where the object which a party has in view is to disprove hand-writing and prove it forged, the most satisfactory method is, to have recourse to the information of the supposed writer himself."—*Garde, page* 49, *and Phillips.*

generally assumed to themselves the power of awarding interest, not only to the date of the decree passed by them, but also to the date on which the debt may be actually liquidated. 2ndly, that on the 13th of Feb. 1808, the Sudder Dewanny Adawlut decided in the cause of Mussummat Mukhun, appellant, versus Mohunt Ram Pershad, respondent, that the restriction contained in Section 6, Regulation XV. of 1793, against a judgment for interest exceeding the amount of the principal, when the legal interest shall have accumulated so as to exceed the principal, is not applicable when the accumulation is subsequently to the institution of a suit, and therefore not ascribable to procrastination on the part of the creditor; and this judgment is adhered to in Circular Order of the 19th December, 1823.

III. In recounting the pleas to an action of this kind, I may observe, that they are the same as are pleaded, with little variation, according to the particular circumstances of each, to the remainder of the suits mentioned in this treatise: they are,

1. Either that the defendant is not liable to the jurisdiction, because the property being real, is not situated therein—or the cause of action has not arisen therein—or he has not fixed his residence therein—either of which predicaments is required to fix the jurisdiction under the 8th Section, Regulation III. of

1793, or the objection may be to the individual jurisdiction of the court, because the amount under litigation is without the pale of its cognizance, or on other grounds. These are termed in the English law special pleas in bar.

2. Also may be pleaded in bar the regulation of limitations. By Regulation III. of 1793, Section 14, the limitation is fixed at twelve years from the date at which the cause of action shall have arisen, unless the plaintiff can prove that the defendant has subsequently acknowledged the justice of his claim, or that he has preferred his suit in some competent court within that period; or unless minority* or other good cause have prevented his seeking redress. The exceptions to the above, as laid down by Regulation II. of 1805, are as follows :—

1*st*. By clause 2, Section 2, claims on the part of Government are cognizable, if preferred within sixty years from the original cause of action.

* A plea of lapse of time will not avail against a claimant during the period of his minority, and the time can only be reckoned against him from the period of his coming of age.—*Sudder Dewanny Adawlut Reports, vol.* 1, *p.* 192. Also in a claim for lands of which possession had been fraudulently obtained, the limitation of time can only be counted against the claimants from the period at which the fraud was discovered.—*Sudder Dewanny Adawlut Report, vol.* 1, *p.* 239.

2ndly. By clause 1, Section 3, suits for immovable property, which the occupant or the person from whom he derived possession, acquired by fraud or violence, and of which the occupant has not held possession by a fair and legal title, believed to convey right, and not obtained by collusion, for a period of twelve years, are not barred by the limitation before quoted, but are cognizable, I apprehend, at any time within sixty years from the date of the original cause of action.

3rdly. No length of time shall bar the cognizance of property mortgaged or in deposit.

4thly. Sections 6 and 7. Informations for fines, and penalties and suits for penal damages, not being compensation for actual loss, to be preferred within one year after the act making liable, unless sufficient cause for delay be shown.

And with reference to limitations on bonds in the English Law, I may here state, that no statute has fixed any limitation to a bond or specialty ; but where no interest has been paid upon a bond, and no demand proved thereon for twenty years, the judges recommend it to the jury to presume that it is discharged. All pleas bearing reference to questions of limitation are special pleas in bar.

3. Thirdly may be pleaded a set off*, by which the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counterbalance that of the plaintiff, either in the whole or in part. Our courts have in some instances, I have reason to believe, on the bonded instrument being proven, declined to investigate a defence of this nature; but it is incumbent on them, as courts both of law and equity, to enter upon all pleas of the kind, whether involving questions of mercantile or Zemindary account, and to pass their decree on the merits.

4. And lastly, a plea to the general issue; which traverses, thwarts, and denies at once, the whole de-

* A set off answers very nearly to the *(compensatio)* or stoppage of the civil law, and depends upon the statutes 2, Geo. II. Cap. 24, and 8, Geo. II. Cap. 24,—which enact that where there are mutual debts between the plaintiff and defendant one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial—which shall operate as payment, and extinguish so much of the plaintiff's demand.—Blackstone, vol. iii. page 304.

An order for particulars of a set off makes it necessary for the defendant to deliver the particulars within a certain period, and in case he fails expressly prevents him from producing proof of his cross demand: if the particular be delivered in time so short before the trial as to cause the plaintiff an embarrassment, he should make application to the court; for by receiving the particulars and not applying to the court, he does away with the objection.—Gardes' Law of Evidence, page 32.

claration, without offering any special matter whereby to evade it. As in debt on bond, that it is not his deed. And as in criminal investigations, a simple denial tends to facilitate the inquiry, and generally to insure conviction; so in civil suits an unqualified defence may be styled an easy plea for decision. The judge is driven at once to the sufficiency or otherwise of the plaintiff's proof, oral and documental, and to see how that proof is supported by the circumstantial evidence of the case. He will thus be materially assisted by ascertaining whether there have been any former transactions of the same nature between the litigating parties; if so, there is a presumption in favour of the truth of this likewise, and *mutatis mutandis**. The judge should also require the testimony of the writer of the bond in the face of the general plea of denial under notice, if it can conveniently be adduced; but such is not required by law.

* In certain cases there may be as strong proof of a debt from the behaviour of a person as a direct acknowledgment by a person. The strength of the declaration depends upon the circumstances existing when made. A full and free admission of a debt is strong proof against the party by whom made, unless accounted for in a satisfactory manner. Although a receipt signed is *prima facie* evidence of the payment, yet the person who signed it may bring proof of his not having been paid the money. An offer to pay money as a compromise is not *proof* of a debt, because this may be done to purchase peace—(but generally speaking I should say, that a debt may be presumed therefrom). —Gardes' Law of Evidence, page 16.

To conclude, actions on bonds do not of course determine with the person: *non moriuntur cum persona*—they may be taken up by the representatives of the deceased, who become *caim makam* and thus stand in his place; and this in chancery process is denominated a bill of revivor, when the suit is abated by the death of any of the parties, in order to set the proceedings again in motion, without which they remain at a stand. The process of becoming *caim makam*, which can happen in all excepting mere personal actions, is first, by petition; secondly, by notice of one month on such petition; thirdly, by proof or disproof; fourthly, by proceeding of the court, admitting or rejecting the claim to represent the deceased, and to revive the dormant suit. And as to the individual upon whom decree should be made; the estate is answerable. Whoever is in possession of the estate is answerable; and on failure of proof as to the possessor, decree may be made upon the effects, leaving the possession to be ascertained in course of execution. Thus by the Mahommedan Law*, heirs are answerable for the debts of their ancestors as far as there are assets; and the obligation in the Hindu Law is even more rigorously enjoined. The obligation on sons and grandsons to pay the debts of their ancestors, even where there are no assets, being, if not civil, at least moral and religious—though without interest in the case of

* Principles and Precedents, page 72.

the grandson. But the great-grandson shall not be compelled to discharge the debts, unless he be heir, and have assets*.

Head II.

II. The second action to which I shall give a place is the action on contracts; and although by the English Law, the covenants which I shall consider might be classed under my first head, as being on stamped paper and under hand, and held in the light of specialties, I shall nevertheless assign to them a separate and distinct station; premising that implied contracts, the remedy for which is, by the English Law, by action of assumpsit, will lie for so many diversities of transactions (some of which will be found narrated in other parts of this treatise), of goods purchased, sold, and delivered, of work performed or agreed to be performed, that it is needless here to particularise them.

1. The first special contract then to which I shall refer is, that on Soudapotros: a deed stamped and witnessed, and which may be termed a deed of merchandize; it is covenanted by the party to procure by a certain date, and at a certain price, timbers, wheat, sugar, or other article, either with or without advance,

* Hindu Law, vol. i. page 127.

assisted sometimes by a clause for a penalty in case of failure.

2. Secondly, on Tahud-namahs, which is likewise a covenant stamped and witnessed, bearing reference to matters of revenue; it is covenanted to collect anp pay certain revenue from certain lands, being either the revenue of the current or of former years. The contractor is allowed specified wages, in proportion to the magnitude of the Tahud. These deeds are generally accompanied by an Ikrar or agreement to the effect, that the Tahudar shall not be held answerable for sums to the realization of which the under tenants may offer good objection. Tahudars are enabled to distrain under the provisions of Regulation V. of 1812, or to prosecute for arrears under Regulation VII. of 1799, and are themselves in their turn amenable to the covenantee, under the summary process last alluded to, or by regular suit.

3. A third species of contract is for the growth and delivery of indigo. Under the fourth head of the third chapter of this treatise I have noticed the miscellaneous petitions relating to this subject: it will be necessary therefore to observe in this place how contracts of the kind may be litigated by regular action; and this is for breach of contract: in which case, under clause 3, Section 5, Regulation VI. of 1823, the person making advances will be entitled to recover the

full amount of the penalty specified in the original agreement, together with all costs and expenses of the suit; but in cases where no dishonest dealing is apparent on the part of the Ryot, the penalty to be adjudged against a contractor, shall not exceed, as provided by clause 4, three times the sum advanced, including interest: and further I may add, that it is again more distinctly repeated by Section 2, Regulation V. of 1830, that individuals instigating indigo Ryots to evade the performance of their engagements may be conjointly sued for the penalty, and all costs and expenses of suit as above-mentioned.

4. Ikrars, or building contracts, are a fourth species of special deed, signed and witnessed, and stamped, proceeding generally on advance, mostly made use of by officers having charge of the repair or construction of public buildings; and the instrument having been proved, the plaintiff will be entitled to recover the advances after deducting the work completed; always giving however the equitable benefit to the contracting person, of any extraordinary difficulty, extra work, or expence, out of the contract. The contractor may also be plaintiff. "He is bound by his contract as far as it can be traced, and entitled to recover upon a *quantum meruit* for the excess only*." These deeds are usually accompanied by securities.

* Comyn on Contracts, page 236.

I will conclude by offering a few observations as to penalty and interest generally on contracts.

Penalty must be recovered whenever it is so specified by the regulations. "It is a forfeiture annexed to a contract or agreement, either for the better enforcing a prohibition, or by way of security for the doing of some collateral act agreed upon between the contracting parties*." A distinction is taken by English lawyers between stipulated penalties or damages, and penalties inserted as bare security. The courts will be guided by circumstances in decreeing penalty and its amount; but I may observe, that in our courts penalty is seldom sued for and recovered as stipulated damages; except the case of Suroop Chand Das, appellant, versus Henry Masseyk, respondent†, which was an action on Soudapotro, instituted by respondent, in which said respondent obtained a decree for advances for silk, and also penalty for every seer of silk non-delivered, for which advances had been made.

Interest, generally speaking, is not given in mere simple contracts. It is recoverable, however, 1*st*, whenever a contract to pay it may be inferred from the circumstances; 2*ndly*, where there is an express pro-

* Comyn on Contracts, page 28.

† Sudder Dewanny Adawlut Reports, vol. ii. p. 89.

mise to pay it; 3*rdly*, upon bills of exchange, promissory notes, and other commercial instruments, upon which it is usually paid or allowed*; 4*thly*, upon awards, where the money awarded is to be paid at a certain day, and has been demanded; 5*thly*, upon amounts declared due by judicial decision.

Head III.

III. Actions having reference to bills of exchange and promissory notes. A bill of exchange is defined by Mr. Justice Blackstone to be "an open letter of request from one man to another, desiring him to pay a sum named therein to a third person, on his account, either at sight or a certain number of days after sight, or after date, or at single, double, or treble usance, or on demand." "A promissory note is a direct engagement in writing to pay a sum specified at a time therein limited, or on demand, to a person therein named, or his order, or to the bearer." Now it having been determined by Section 15, Regulation III. of 1793, that the rules of the country shall be followed in litigated points, having reference to the above documents, it will be sufficient that I simply notice the few decisions which I find in the reports of the Sudder Dewanny Adawlut, as tending to determine those rules and that usage.

* See the head following.

In the case of Gour Sirdar *versus* Gopi Dutt*, decided in 1818, it was held—A having by mistake sold to B a promissory note for 2000 Rupees, instead of one for 500, and having sued him to recover the difference between the two notes, B having sent the note to C his agent, pleads ignorance of the mistake, and refers A to C. It being proved that A had no dealings with C, judgment was given against B, leaving him the option of suing C for the recovery of the difference. Also in the case of Ishur Pershad and Mussummat Pana, *versus* Hurbang Lall and others†, decided in 1822, it was held that the sellers of a bill of exchange, which was not discharged, though accepted by the drawer, were responsible for the amount in the first instance without reference to the acceptor; in this case, it was deemed expedient on appeal to ascertain more minutely the custom of the Calcutta merchants as to the party upon whom the responsibility should rest, whether on the drawer or seller of the bill, or on the acceptor. It was gathered from the evidence of certain Gomashtahs examined to this end, "that although, ordinarily speaking, the acceptor of a bill is liable for its amount, yet if from any cause he should not discharge it, the bill is returned to the person from whom it may have been received; that if the drawer or endorser of the bill be on the spot, the holder should give him information,

* Volume ii. p. 281, Sudder Dewanny Adawlut Reports.

† Volume iii. p. 177, Sudder Dewanny Adawlut Reports.

but that there was no necessity for formally certifying the non-receipt of the amount of the bill; that regular protests were occasionally entered into, but that the practice was neither universal nor necessary, and that the drawer or seller of the bill was under all circumstances responsible for the payment of the amount, the seller being considered liable in the first instance, and after him the drawer." Again in the case of Naroopa Naik, *versus* Mr. David Clark, decided in 1823*, it was held in like manner that the seller of a bill of exchange is answerable for the amount in the first instance, when not paid by the drawer; also that his having lodged the amount of it in the hands of another banker, on account of the purchaser, without the purchaser's sanction, does not exonerate him, and that his not having received back the bill or caused it to be cancelled affords sufficient presumption, in the absence of proof to the contrary, that such sanction was not obtained.

Head IV.

IV. I shall assign the fourth place to an action, which I shall denominate an action of account—and which I shall divide, into account mercantile and account Zemindarry; and as matters of disputed accounts are frequently made subjects of arbitration, I shall

* Sudder Dewanny Adawlut Reports, vol. iii. p. 248.

take the opportunity of relating its general rules, as well as any decisions of the courts bearing upon that very excellent method of adjudication; and,

1. First, as to suits on account mercantile: and these are chiefly brought upon the Khata books*, on the ledger statement of the firm or banking house; and the account books of a banking house, it has been determined†, will be held to furnish good evidence of a debt, if their authenticity is sworn to by the writer of them, or if their authenticity may be presumed by correspondent entries in the books of any other respectable house‡; but entries in the books

* Private account books, unsupported by proof, are not admissible evidence.—*Macnaghten's Mahommedan Law*, p. 370.

† Ulruck Sing *versus* Brijpal Das—*Sudder Dewanny Adawlut Reports*, vol. iii. p. 417.

‡ Entries in the books of a tradesman, by his deceased shop-man, who thus affords proof against himself, have been received as evidence of the goods delivered, or of other matter there mentioned, within his knowledge. If the shop-man is alive, he should be produced, and he may use the entry as a memorandum to refresh his memory. The shop-book of a tradesman is not evidence in any action for wares delivered or work done above one year, before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for the said debt, or shall have brought against him some action within a year next after the delivery of the wares or the work done—but this does not extend to the mutual trading and merchandize between tradesman and tradesman. But an entry made by a tradesman himself, stating the delivery of goods, is not evidence for him.—*Garde*, pp. 48, 49.

of a banking house, unsupported by other proof, are not held sufficient evidence to prove an account or a debt*. In advertence to the responsibility of parties. In the case of Mr. Powell, versus Mootee Ram†, the claim of the appellant (Mr. Powell), for the balance of an account, was dismissed; respondent appearing to have acted as Gomashtah of a banking house, and not being personally responsible. But the parties of a banking concern were held jointly and severally responsible for an undertaking executed in their names by the managing partner‡.

2. As to suits on account Zemindarry; by which Sudder Malguzars are enabled to sue individuals contracting with them or appointed by them, for the collection of their revenues; and although in most of these instances the action may be either by regular or summary process, I come now to consider it under the first head,—as a regular action determinable on the merits; but not unfrequently springing from the summary decision above alluded to. And as it is more generally the custom for Sudder Malguzars to sue their under-tenants, I mean their Talukdars and Ryots, on their Caboulicts, or on their Kistbundies, (which latter is a Cabouliet of a different form, covenanting to pay by instalments, of a short

* Bunsi Dhar Nandi *versus* Mirza Mahommed Sharif, vol. ii. p. 271, Sudder Dewanny Adawlut Reports.

† Sudder Dewanny Adawlut Reports, vol. i. p. 97.

‡ Sudder Dewanny Adawlut Reports, vol. iii. p. 1.

term, and usually concluded with Talukdars of recent creation,) I shall confine my remarks under this head to those collectors and contractors who do not come under the description of under-tenantry above noticed—considering this rather in the light of an action of civil account, and reserving revenue matters generally to be discussed in my second chapter, according to the plan proposed.

1st. The action of account then will lie, on the Gomashtah, the agent, the servant of the Malguzar; it is generally founded upon a Jummah Wasil-baki, an account showing the sum demandable, the sum collected or paid, and the sum still due.

2nd. On the Ihtimamdar, a definition of which tenure may be seen on reference to the answers of some learned natives, to questions proposed to them, quoted in the third volume of Harington's Analysis: it is sufficient for our present purpose to consider him merely as a Tahsildar or collector; in fact, a servant of the Sudder Malguzar, though frequently assuming to himself a permanent right of collection, on the grounds of immemorial usage.

3rd. On the Tahudar—a covenant so certain and explicit, that I have classed it likewise with the special contracts noticed in my II. Head. The Sudder Malguzar advancing a claim to certain items on the

one hand, the Tahudar pleading the impracticability of their realization on the other.—A question of account also is raised, determinable on the merits.

4th. On the Meiadee Ijarahdar or farmer, for a term of years;—when after the expiration of the period assigned, it is necessary that the giver of the farm should come to a settlement with the taker thereof. I allude to the transaction usually called a Meiadee Ijarah Bandacpotro, partaking in its nature so nearly to a mortgage, that we might almost assign it a place with suits of that description. A deed of Meiadee Ijarah runs nearly as follows: I, Mahommed Hussein, have fifty beegahs of land in certain villages, the Mofussil collections of which, as shewn by the Towjis signed and delivered to you by me, amount to one hundred and fifty Sicca Rupees per annum; I, Mahommed Hussein, having received from you Shaik Alim, the sum of Sicca Rupees two hundred and seventy, do let the above land in farm to you for the term of seven years. Do you possess it and collect the rents thereof, according to the Towjis above-mentioned*. These are the conditions; you will pay into the office of the collector fifty rupees out of the collections made by you. Keep an establishment of twenty rupees out of such collections; and the balance you

* This is not always adhered to—Ijarahdars, particularly under the court of wards, frequently exceed the rentals as exhibited in the Towjis.

will be yearly entitled to. Now this transaction, it will be observed, is little different from a mortgage; the interest of the money on the one hand, being set off against the surplus proceeds of the Ijarah on the other. It is also engaged in for the purpose of obtaining for capital more than the legal interest: farms of estates too are frequently given to creditors in liquidation of their demands*.

5th. Actions of account may likewise have reference to transactions of mortgage, and conditional sale on mortgage, when it becomes necessary to calculate the usufruct of the property mortgaged against the principal and interest, or interest simply of the sum borrowed; but these important subjects will be found presently treated of under separate and distinct heads.

6th. And a sixth and last question of account may arise with advertence to clause 2, Section 5, Regulation V. of 1830, wherein it is provided, that persons wishing to be released from engagements to cultivate the Indigo plant may petition the court, who will grant such release on such persons' entering into court any balance which may on investigation be adjudged to be due from him; and if the advancing person refuse to accept it, the court will return it to

* See the precedent of Beea Mokasa and Ijarah, quoted by Macnaghten.—*Mahommedan Law*, p. 175, also Head VIII. p. 261 and Note.

the petitioner, leaving the defendant to seek his remedy, by a regular suit, which being instituted, will resolve itself into a question of account, decidable on the merits.

III. In the order which I proposed, I will offer in conclusion a few remarks relative to the system of arbitration, as established by regulation and precedent; premising that in imitation of the Chancery masters, Sudder Ameens may, in conformity with Section 76, Regulation XIV. of 1823, be required to investigate matters of account*, essential to the determination of any suit under trial.

By Section 2, Regulation XVI. of 1793, courts may recommend parties in suits, having reference to disputed accounts, partnerships, debts, suspicious bargains, or breach of contract, to refer their quarrel to arbitrators: one arbitrator being by Section 3, sufficient, should the personal property in dispute not exceed two hundred rupees in value. The courts should be careful to have executed the arbitration bond as provided by Section 5, and the arbitrators are by Section 6, vested with much the same powers as the courts themselves in executing process and procuring the attendance of witnesses; and no award, says Section† 9, should be set aside, unless gross

* Also of fact or usage.

† Section 28, Regulation V. of 1793, which provides for the dismissal with costs of an appeal preferred against the decision

corruption or partiality be proved against the persons entrusted with the arbitration. It appears to me that the rules contained in Section 3, Regulation VI. of 1813, for executing by summary process, subsidiary to a regular suit*, private awards respecting the property of lands or limited tenures therein, (by the 2nd section of which regulation, suits of the above description are referrible to arbitration under the general rules of the enactment of 1793,) should likewise be extended to private awards in questions of disputed accounts, mercantile, contractory, or Zemindarry.

Head V.

V. Actions of Grivi or Rihn, or simple mortgage; which I shall consider under a distinct head from that of Bye-bil Waffa, or Catcabalah, or conditional sale on mortgage. The first assimilates with the *vivum*

of any zillah or city court, founded upon an award of arbitration, unless it be fully proved to the satisfaction of the court by the oaths of two credible witnesses that the arbitrators have been guilty of gross corruption or partiality, construed not to require proof of such corruption or partiality previous to the admission of the appeal.—*Sudder Dewanny Adawlut Reports*, vol. i. p. 288.

* See Circular Order of 24th February, 1816, also case of Ram Surrun, appellant, versus Sabordha Nisser.—*Sudder Dewanny Adawlut Reports*, vol. iii. p. 4.

vadium, or living pledge; the second, with the *mortuum vadium*, or dead pledge, of the English Law.

"*Vivum vadium*, or living pledge," says Blackstone, "is when a man borrows a sum, suppose £200, of another, and grants him an estate, as of £20, per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditional, to be void as soon as such sum is raised, and in this case, the land or pledge is said to be living—it subsists and survives the debt, and immediately on the discharge of that results back to the borrower."

And this is the Grivi of the Asiatics: it was formerly the custom for the usufruct of the property to be taken in lieu of interest on the mortgage bond, but the hand of the legislature was soon prepared to rectify a custom by which much injustice might be caused, and it was accordingly enacted by Section 10, Regulation XV. of 1793, that subsequently to certain dates specified, legal interest, namely, 12 per cent. per annum, should be allowed on all mortgage bonds, for real property; and that such mortgages should be considered cancelled, whenever the principal sum, with simple interest due thereon, shall have been realized from the usufruct of the property mortgaged, if not otherwise liquidated by the mortgagors; and the mortgagee is required by the same regulation, in order to the adjustment of accounts

in cases where he shall have had the usufruct of the property, to deliver in true accounts of his receipts and disbursements, and to swear to the same; and the mortgagor is permitted to examine them, and the court after hearing any objections he may offer, or examining evidence respecting them, will proceed to their adjustment. And in actions of this description, I may say that herein the chief difficulty lies, in ascertaining the true amount of rents received by the mortgagee, in obtaining mofussil documents sufficiently well authenticated, upon which to pronounce a decree.

It remains simply to notice under this head, any points which have been holden by our courts in modification or in explanation of the law as established by Regulation. In the cause of Behari Lall, versus Mussumatein Phekoo and Fuhmida, decided in 1805*, "Two questions," says Mr. Macnaghten, "were determined relative to the sort of mortgage described in the report: 1*st*, it was determined against the claim of the plaintiff, that a mortgagee, having under the terms of the deed accepted the usufruct in lieu of interest for an indefinite period, has no right to demand at

* See Reports of Sudder Dewanny Adawlut, vol. i. p. 121.

In the distribution of effects of a deceased person, the mortgagee may pay himself out of the mortgage on the death of his debtor—his claim has priority before those of the other creditors.—Macnaghten's Mahommedan Law, p. 347.

his own convenience payment of the debt from the mortgagor, but must await his voluntary payment of the principal or the gradual extinction of the debt, under the operation of Section 10, Regulation XV. of 1793, in case the annual usufruct exceed the legal interest; *2ndly*, that the rule above cited does not annul the stipulation of a mortgage which may be in favour of the borrower, but has provided, that any excess above the legal rate of interest shall be applicable to the liquidation of the principal. A mortgage of this sort is intended to secure to the lender the punctual receipt of a sum not exceeding the legal interest of his loan, but the law does not permit it to be abused for the purpose of obtaining under the name of usufruct an usurious interest." In this cause the profits on the mortgaged lands were not equal to the amount of legal interest on the sum borrowed. And a mortgagor is entitled, under Section 2, Regulation I. of 1798, as construed by the orders of the Sudder Dewanny Adawlut*, to recover summary possession of an usufructuary mortgage on payment of the principal sum borrowed, the question as to interest being left open for future adjustment†.

* Circular Orders of July 22, 1813.

† Sudder Dewanny Adawlut Reports, vol. iii. p. 3.

Head VI.

VI. Of Bye-bil Waffa or Catcabalah, or conditional sale on mortgage:—which transaction, as I have before observed, partakes so strongly of the nature of the *mortuum vadium* of Blackstone, that it will not be amiss to introduce the following extract concerning it from the work of that learned commentator. "*Mortuum vadium*, a dead pledge or mortgage, which is much more common than *vivum vadium*, is where a man borrows of another a specific sum, *e. g.* £200, and grants him an estate in fee on condition, that if the mortgagor shall repay the mortgagee, the said sum of £200, on a certain day named in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or as is now the more usual way, that then the mortgagee shall reconvey the estate back to the mortgagor. In this case, the land which is so put in pledge is, by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor, and the mortgagee's estate in the lands is then no longer conditional but absolute. But so long as it is conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether by taking such estate in fee it did not become liable to the wife's dower, and other incumbrances of the mortgagee, (though that doubt has been long ago over-ruled by our courts of equity,)

it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void in repayment of the mortgage money, which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be. As soon as the estate is created, the mortgagee may enter upon the lands, but is liable to be dispossessed on performance of the condition by payment of the mortgage money at the day limited, and therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it, and take possession without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose, and though the mortgage be thus forfeited, and the estate absolutely vested in the mortgagee, yet they will consider the real value of the tenements, compared with the sum borrowed; and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recal or redeem his estate, paying to the mortgagee his principal interest and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100, or a less sum. This reasonable

advantage allowed to mortgagors is called the equity of redemption; and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received on payment of his whole debt, and interest, thereby turning the *mortuum* into a kind of *vivum vadium*. But on the other hand the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently; or in default thereof, to be for ever foreclosed from redeeming the same: that is, to lose his equity of redemption without possibility of recal; also in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not however usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious or small, or where the mortgagor neglects even the payment of interest; in the latter instance, it will be as a *pignus*, in the former, as the *hypotheca* of the Roman law."

The practice of India differs in this.—That it is usual for the mortgagee to take possession of the land conditionally sold.—That the term of conditional sales is never a long one, seldom exceeding a period of ten years.—But a species of equity of redemption has been extended to Indian landholders by Sections 7 and 8, Regulation XVII. of 1806, granting to them

for the exercise of this equitable right a reasonable period; the ministerial conduct of our courts concerning which will be more properly reserved for the chapter on miscellaneous petitions*. I will under the present head make some general remarks relating to actions of Bye-bil Waffa, and notice any peculiar suits which have been adjudicated. And,

1st. Mortgaged property may be redeemed: before application for a foreclosure has been made; by payment of the amount due to the mortgagee, or his legal representative, or by full proof of legal tender; or by depositing the amount in court.

2nd. After application for a foreclosure, under the provisions of Regulation I. of 1798, as modified by Regulation XVII. of 1806, at any time within one year from and after the summary application above alluded to, by payment or deposit of the amount due, in like manner.

3rd. As to the amount required to be deposited in either case.—When the lender has not obtained possession of the lands, this is to be the principal sum borrowed, with interest at twelve per cent. per annum, whether stipulated or not; where he has obtained possession, the principal only; adjustment to be made between the interest and the usufruct; a less

* See Head VI. Chap. III.

sum than required may be deposited, but at the risk of the mortgagor; in cases of Bye-bil Waffa, the usufruct is not to be taken in payment of the principal; otherwise adjustment of accounts is to be made in conformity with the principles prescribed with regard to mortgages, in Regulation XV. of 1793.

4th. As to legal tenders, by Section 4, Regulation I. of 1798, a Teep shall not be considered as such, unless accepted by the lender, the proof of which acceptance shall be the lender's giving up the bill of sale, or granting a written acknowledgment for the money lent: and again, it was decided in the case of Gopal Das, *versus* Maharajah Pitumber Singh*, that the tender to a mortgagee of the money borrowed by a stranger to the transaction is not sufficient to prevent a foreclosure.

5th. Mortgages can only be foreclosed by a regular suit instituted to obtain said foreclosure, subsequent to the operation of Sections 7, and 8, Regulation XVII. of 1806.

† Nor is it requisite in the trial of these suits, that an engagement, making the sale conditional, which however usually accompanies, should always be pro-

* Reports of Sudder Dewanny Adawlut, vol. iii. p. 54.

† Hidayat Ali and Kadir Ali, *versus* Prem Singh.—Reports of Sudder Dewanny Adawlut, vol. iii. p. 250.

duced; in some instances where a deed of absolute sale only is forthcoming, the court in its extreme tenderness to mortgagors will from the complexion of the case, and more particularly from the sum borrowed being of inadequate value, presume that the transaction is merely one of Bye-bil Waffa, giving the mortgagor the benefit of such presumption, and permitting him to redeem. The condition is sometimes comprised in the deed of sale, sometimes separately annexed; and actions are not unfrequently brought for possession on the ground of an absolute sale, the conditional agreement being purposely withholden.—In the case of Meer Alleem Ullah, *versus* Alif Khan*, it was held that the inadequacy of the consideration was a sufficient ground for allowing the equity of redemption under the exposition of the Mahommedan Law, that inadequacy of price vitiates the sale by an agent. The Editor has further justly remarked in his note, "That the intention of the parties as collected from the tenure of the deed, shows whether the Bye-bil Waffa be a sale with the reserve of an option of retractation within a limited time, or a mortgage for the security of money lent; a stipulation for a short period must be considered to mark that a sale was in the contemplation of the parties; a long term denotes a mortgage or security for a loan; and such mortgages in the form of conditional sales are very common, and rightly held valid under the opinion here cited."

* Reports of Sudder Dewanny Adawlut, vol. i. pp. 55—58.

HEAD VII.

VII. Actions for damages :—It will be seen that in as many cases as possible, the seeds of English Law have been transplanted by the mother-country into her Asiatic possessions, and assuredly they have met with not a little nurture and encouragement; accordingly, the Adawlut is empowered to hear and determine all suits for every injury of property and also for every personal injury, whether by actual bodily hurt or insult, by unlawful imprisonment, or by malicious defamation affecting character, caste, or livelihood. It was formerly the custom, I apprehend, in cases of this description, for the Câzi to impose a suitable fine upon the offenders: how thankful then should we be to the beneficent compiler of the code of 1793 for the more complete protection which he has afforded both to person and property, a protection which we had hitherto been entirely unaccustomed to enjoy !!!—I have seen actions brought for damages for libel—in such cases, the plaint usually sets forth that the plaintiff is a person of good family and connexions, it enumerates them and their employments, and the society in which plaintiff has been accustomed to move; it then makes mention of the actionable words, and prays the court to grant a certain sum in damages. I have seen too—an action brought by a woman against her seducer for compensation in damages for loss of character. I have seen too—a person who has been ejected from a feast bring an action for damages against his host, and others of the

party who subsequently declined to invite him to their houses. Now I do not think it advisable that this kind of suits should be allowed to increase; they can generally be with more propriety settled in a summary manner by the judge or the magistrate, or by reference to arbitration: but should they come to trial, I may remark, that in order to recover damages, plaintiff must prove that he has suffered some loss in his employment or business by the libellous conduct of defendants, or as in the similar cases of accidents by careless driving, upsetting of stage-coaches, that he has in like manner sustained loss by personal injury. That in the case of the woman, the suit should, according to the principles of English Law, have been brought by the father for loss sustained by deprivation of the services of his daughter, or by herself for breach of promise of marriage, supposing such to have been made.—That in the last-mentioned cases, the object of the plaintiff is to procure his re-admission into the society from which he has been ejected; an order for which, should he seem to deserve it, will in general, with costs, be found sufficient to answer the purposes of the suit.—But in no instances of the above description, unless of great hardship, loss or oppression, should damages be awarded. I have seen too a further action for damages, which may be conveniently classed under this head, brought by district Cazis, who have been endamaged by the assumption of their office, and by the reception of their fees (Russoom),

by other unlicensed priests. Mr. Harington informs us in his Analysis, "That as every Hindoo family has its Purohit or priest, who assists in the performance of all sacred or solemn rites, it would be obnoxious if not impracticable to frame any Regulation either for the appointment of the Hindoo priesthood, or for limiting the compensation to be received by them; and experience has not shown that any alteration of established usage in these respects is required." But the Mahommedan priests or Cazis have been brought more immediately under the jurisdiction of the courts, by the enactment of Regulation XXXIX. of 1793, entitled, A Regulation for the appointment of the Cazi ul Cassaat, or Head Cazi of Bengal, Behar, and Orissa, and of the Cazis stationed in the several districts, and prescribing their respective duties. It is declared by Section 8, that the Cazis are not to exact any fees for drawing upon attesting paper, or for the celebration of marriages, or the performance of any religious duties or ceremonies which it has been customary for them to perform, excepting such as the parties concerned may voluntarily agree to pay, as has been hitherto the practice. They are at the same time declared liable to be sued in the civil courts for any undue practices in the discharge of the duties prescribed to them.

Points of this nature may be in general better adjusted by miscellaneous proceedings or by fine by

the civil court, of the parties offending; but there is no doubt that if certain licensed Cazis are allowed under the implied sanction and authority of the ruling power, and unlicensed individuals shall illegally assist in the performance of religious ceremonies, they and the persons by whom they may have been employed are amenable by an action in damages to the amount of the fees so illegally paid or received. In some districts a complete hierarchy, connected link by link, has been formed. The city or district Cazi has his Sunnud from the court; each Moollah or officiating priest has his Sunnud from the city or district Cazi; on each appointment, the accustomed Nuzeranah is tendered, and received. Banns of marriage are published: or in other words, an ihlam is taken out from the Cazi; for although in strictness of law, neither is this necessary, nor that the ceremony should be performed by licensed Moollahs, inasmuch as it becomes contracted by the simple operation of proposal and consent, in the presence of competent witnesses; yet it has hitherto been the custom, and under the provisions of Regulation XXXIX. of 1793, it has been construed to be the law, in order to the prevention of illegal and incestuous marriages, to employ either the Cazi, or his licensed deputy.

Damages may also be awarded against officers conducting sales of land by Section 26, Regulation XI.

of 1822*. Against collectors, for unlawful confinement of individuals for arrears of revenue, should the demand be proved to be incorrect. Against landholders for unlawful arrests, by clause 5, Section 15, Regulation VII. of 1799; for levying arrears not due, or for illegal distraint by Regulation XVII. of 1793†, or for improper sale of Putnee Talooks, under clause 1, Section 14, Regulation VIII. of 1819. Again, persons endamaged by dispossession from lands and premises may sue for damages in a regular suit under Section 5, Regulation XV. of 1824, and generally an action for damages will lie in all cases of destruction and defacement of property, by levelling of embankments, changing the course of irrigation, wilfully cutting down crops, or destroying them by means of stray cattle, or the like.

* See further, Head I. Chapter II.

† Suits instituted by Ryuts and others, under the provisions of Sections 15, 16, or 17, Regulation V. of 1812, for trying the justness of disputed demands for rent, especially suits instituted under the section last mentioned for the recovery of damages, on account of injury sustained by the illicit sale of property, shall, in pursuance of Section 20, of that Regulation, be decided as summary suits, unless the plaintiff shall prefer to institute a regular one.—See Circular Order of Sudder Dewanny Adawlut, of December 12, 1816. The process may be in like manner, I should imagine, either regular or summary in the cases of unlawful arrest or distraint quoted in the text.

Head VIII.

VIII. Of actions relating to securities.—Now securities may be—

1. Those given in the offices of the different Government functionaries—as in the office of the collector, by individuals employed in the Government duties, in the collection of the revenue, in the distribution and sale of stamps, in the management and administration of estates ; and so general is the system of demanding ample securities, either directed by regulation, or induced by the fear of Government officers, that they themselves may be held responsible, that it is almost impossible to find in any district, I speak of Bengal more particularly, an estate, which has not either in whole or in part, been given in security, whereby private transfers are impeded, and difficulties thrown in the way of the sale of lands for the realization of the Government dues. By being placed in security the estate or portion of it becomes pledged for amounts embezzled or not collected, by its surplus proceeds by sale, after deducting the revenue of the state. In the case of Ranee Kishomonee, *versus* Mr. Battye*, it was held that it is requisite that a former security bond shall have been duly cancelled, though fresh security may have been taken on account of the insufficiency of the

* Sudder Dewannny Adawlut Reports, vol. ii. p. 195.

first. And in an action* brought by certain joint Hindu proprietors against the collector, and the surety of their copartner (who was treasurer, and had defaulted and absconded), for the recovery of their shares of the joint property, which had been sold on account of the defalcation, judgment was given in favour of plaintiffs, and it was held that the surety was solely liable, he having pointed out the property as exclusively belonging to the defaulter: and again the surety of a native officer employed under a collector, such surety having been taken according to Section 16, Regulation III. of 1794, is not liable to make good a defalcation discovered after the death of such native officer, but the heirs should be proceeded against by regular suit†. Also in the case of Baboo Moote Chand, *versus* Moote Abdoolah and others; it was held that it is not an evasion of the usury regulations for a surety to exact more than the legal interest in advance of Government revenue made by him, in compensation for his risk‡.

2. Surety bonds, having reference to suits of all descriptions, being as it were part of the subject matter for adjudication, embracing the liability of defendants themselves, and entered into indepen-

* Sudder Dewanny Adawlut Reports, vol. iii. p. 98.

† Collector of Moorshedabad, *versus* Lalla Sohun Lall, vol. iii. p. 65.

‡ Vol. iii. p. 261.

dently of any order of the court or existing regulation—and these render the person who covenants answerable according to the circumstances of the case. Sureties in debts are generally answerable for their principals under both the Mahommedan and Hindu Laws. It is stated by Macnaghten*, that where two persons are joint sureties for the payment of a debt, and one of them die, the survivor will not be considered as surety for the whole debt, unless there was an express stipulation that each should be surety for the whole, and that one should be surety for the other. The estate of a deceased surety is according to the Hindu Law liable for the debts of his principal on his default†; bail bonds are generally drawn out so as to bind the heirs.

3. A third and last classification of securities may be said to be, those entered in furtherance of the process or in obedience to the precepts of the courts of civil justice, which may be either Hazir Zamin,security for personal appearance, or Mal Zamin, security for property—as the security which procures the temporary release of defendants, after their apprehension by the summary Regulation VII. of 1799—the security given by under-tenants whose property has been distrained, under Regulation V. of 1812;

* Mahommedan Law, p. 72, principle 4.

† Hindu Law, vol. ii. p. 285, and note.

bail for personal appearance in regular suits, under Section 4, Regulation II. of 1806—Mal Zamin for the security of property under litigation, and for the execution of decrees, under Section 5, Regulation II. of 1806—and securities given in appeal for the staying or enforcing of execution; in reference to which it may be observed, that by the provision of Section 13, Regulation XXVI. of 1814, persons who may enter into security bonds in cases of appeal shall not transfer by sale, gift, mortgage, or otherwise, any property so pledged by them, until the object of their security shall have been completely fulfilled. The succeeding clause, 3rd, explains that this prohibition shall not be construed to affect the legality of any private transfer or mortgage, where the security may duly discharge any amount, which may eventually be due from him, though such private transfer shall not bar the prior right of the court to hold the property answerable in the first instance.

In conclusion, I will make a few general observations on the nature and the method usually taken to ascertain the sufficiency of those securities referred to in the 1st and 3rd divisions of the subject.

Unlike the English courts, it is not the practice to perfect bail to each original suit, but only where it is specially required by the plaintiff on suspicion of an intention on the part of the defendant to abscond

or make away with his property. Actions are therefore frequently gone through without the entrance of any security. By the 13th Section of Regulation XIII. of 1808, the judge is enjoined to be particularly careful in ascertaining the goodness of bail, and is directed to cause the Nazir or sheriff to deliver in as accurate a statement as can be obtained, and the said Nazir is further to be held responsible for any wilful misrepresentation or neglect. Now in ascertaining the sufficiency of real property Malguzary, it is usual to refer to the records of the collector, in order to be informed, 1*st*, as to the existence of the proprietary right of the surety; 2*ndly*, as to the extent of that right; 3*rdly*, as to whether that right is free, or in other words, has not previously been pledged. Where the property in question is not Malguzary, or being Malguzary, the right of the Malguzar does not appear on the collector's records, it rests of course with the judge and Nazir to use such precautions as they may deem necessary, towards ascertaining the goodness of bail bonds; by documental or oral proof of proprietary right.

Head IX.

IX. I may aptly conclude this chapter with the action for Wasoolat or mesne profits; and these may be said to accrue during the unlawful dispossessment of an individual from his right of property, and may

either be of things real or of things personal, either relating to the profits of lands, or the interest of monies; the remedy by the English law, is by action of trespass*. The principal points for consideration in each suit, are, 1*st*, the period for which the plaintiff is entitled to mesne profits—2*ndly*, their amount; and,

1. The plaintiff will be entitled to mesne profits for the period during which defendant may retain illegal possession of his monies, or fail to satisfy the original decree or final judgment of the court; or from the period at which he was actually and unlawfully dispossessed from real property, or from the period at which he should by right have obtained possession. Hafiz, the rightful possessor of a Zemindarry, was dispossessed in the year 1793.—Hanif, the heir of Izzutoola, should have succeeded his father in 1793, but has been kept out of possession; the right of mesne profits commences at the same period in each case†.

* Blackstone, vol. iii. p. 205—208.

† The gift of an estate having been declared invalid, and the donee having had possession thereof, is it legally incumbent on said donee, to account to the donor's heirs *for mesne profits?*

The mesne profits, it was answered, accruing from the estate in this instance (analogously to the law by which invalid sales are governed), are not considered definite property or identical with the state itself; and according to the opinion of Aboo Haneefa, the donee is not accountable to the donor's heirs for

2. The amount will be ascertainable by the actual profit of the land of which defendant has had unlawful seisin; in pecuniary cases, by a calculation of the legal interest. It is permitted by the Regulations*, to refer matters of account to Sudder Amins for investigation, and thus they may frequently be usefully employed in the calculation of mesne profits. In a case reported in the second volume of the Sudder Dewanny Adawlut Reports†, the plaintiff having been adjudged entitled to half the proceeds of a religious establishment, and suing in a supplementary action for half the mesne profits derived by defendant during her sole possession, there being no means of ascertaining their amount, a decree was passed that plaintiff should hold sole possession during a period equal to that for which defendant had enjoyed the same: which decision was upholden by the superior courts.

But it would appear by certain decisions of the Sudder Dewanny Adawlut, that the plaintiff is at

mesne profits. The two disciples maintain the contrary, but the opinion of Haneefa is best received and most acted upon.

In this case the donee was a minor: according to the opinion which I have hazarded in the text, the donor's heirs would be entitled to mesne profits from the period at which their right commenced. Macnaghten's Mahommedan law, p. 239, and note.

* See Regulation XXIII. of 1814, Section 56.

† Massammaut Rajoo and others appellants, *versus* Massammaut Buddun respondent, vol. ii. p. 13.

liberty to sue in one and the same action, both for the property in chief and for the mesne profits. Only in the event of doubts existing as to the right to mesne profits or alleged collections however denominated, it is necessary that a separate suit should be brought for them; otherwise the court which adjudges the proprietary right in real property may at the same time add an order for the mesne profits to be accounted for, without regard being had to their amount, or to the question of the jurisdiction of the court being barred thereby*, the amount to be calculated I apprehend, during progress of execution. In cases of the interest of monies, in like manner, the necessity of a supplementary action of the kind is now generally voided by a practice of the courts, of at once awarding in their decisions interest until the payment of the debt; and of escaping from conformity with the original rule, by which no more interest than principal could be decreed†.

* Circular Orders of Sudder Dewanny Adawlut of 29th Sept. 1820.

† See Circular Orders of Dec. 19th, 1822.

PRELIMINARY REMARKS TO CHAPTER II.

Intimate connection of judicial and revenue matters in Asiatic practice. Junction and amalgamation of collectors and judges recommended. Lands are either Kheraj or Lakheraj, and proprietors broadly defined to be, 1st, Sudder Malguzars, 2ndly, under-tenants, being Talukdars and Ryuts. Further consideration of Kheraj property deferred to the body of the chapter. Lakheraj property discussed; transfers therein how clogged by existing Regulations. Lakheraj tenures classed and specified according to the author of the Law and Constitution of India; what is necessary to their validity according to Regulation XIV. of 1825. General effects of resumption. Of endowed lands; Hindu and Mahommedan Laws on the subject, and substance of Regulation XIX. of 1810. Nature of the suit brought for the recovery of endowed lands; proposals to modify the existing law in order to the easier reunion of these lands—and concluding Remarks.

The administration of justice and the revenue, is so closely connected in Asiatic practice, that the wisdom of that policy which assigned separate and distinct paths for each department may justly be questioned. If there should be a junction of any two offices, that of judge and collector in preference to that of collector and magistrate is what I would recommend. Under the present Government, it is true, collectors are placed in the seats of justice, and

judges are appointed to the collection of the revenue; thus an amalgation is gradually taking place. So many suits originate in the nature of landed tenures, so many emanate from the perpetual settlement of 1793, and from the perplexed character of those variations in landed property which by it have been created, that it appears to me impossible that the office of judge can be properly filled by one who has not studied the duties of a collector; or in whose person collectorial jurisdiction is not combined. It is intended with all due humility to attempt in this chapter, shortly to notice some of the most common suits relating to land, in the course of which it will be necessary to state the provisions of the revenue code as they bear upon each particular species of action.

Now land is either kheraj or lakheraj; *kheraj*, paying revenue into the exchequer; *lakheraj*, exempted from the payment of a Government assessment. Without reverting to the discussion of that *vexata quæstio*, "*who is the real proprietor*," I shall broadly define, for such has been admitted by the statute law, that proprietors are of two kinds:—

1*st*. *Sudder Malguzars*, to whom proprietary right, in addition to the right of collecting and paying into the treasury the Government dues, has been granted by the Regulations.

2ndly. Under-tenants, Talukdars, and Ryuts, possessing a full proprietary right and title in their tenures in certain instances and on certain conditions.

But leaving the variations of kheraj property to be more plainly and aptly developed in the course of the ensuing chapter, particularly in the second and fourth heads of action, I shall confine myself in these preliminary remarks to a consideration, 1*st*, of real property, lakheraj; and, 2*ndly*, of lands endowed.

1. Now lakheraj lands may be said to be subject to the same rules which govern lands kheraj; they also, (I allude of course to cases in which the right to the tenure exists in full,) having a Malik or proprietor, generally Talukdars or middle men, beneath whom are the Ryuts. But it is observable, that the tenures of lands of this description, whether we consider them with reference to the head proprietor or lakherajdar, that is to say, the individual to whom the produce of the land has been assigned, or with reference to the under-tenantry, are not so frequently brought under litigation, or so complex in their various ramifications, as those of an estate settled in perpetuity. The reason is obvious; not being saddled with a revenue, which must of necessity be entered into the exchequer at stated periods, and which sticks to the land throughout every change of ownership; freed too, from the complicated machinery of those Regulations

upon which the permanent settlement is made to turn, transfers and alienations in lands rent-free, when the title is not harassed and disturbed by the ruling power, move unrestricted and unencumbered.

But now, the requisition contained in the code of 1793 has been more particularly repeated by Regulation III. of 1828, and transfers in rent-free lands must, under a penalty of the revenue of one year, be notified to the office of the collector within six months from the date on which they may have taken place. All suits, moreover, in which the question may be agitated, "whether the real property in dispute is subject to pay revenue or exempt from it," and I may say, it is now held, all suits, in which any mention is made of the rent-free tenure, or which are founded thereon, shall, by Section 30, Regulation II. of 1819, be referred immediately on their institution by the judge to the collector, who will decide, whether the land is kheraj or lakheraj, after which the court will determine such suits on the merits.

It would thus appear that real actions for land not kheraj can only be adjudicated after the land has been admitted or ascertained to be actually lakheraj. They are relating to boundaries, in which the other party is generally a kherajdar, or between sharers or partners; but more generally consist of claims of inheritance, partition, and the like. They may also be

for revenue, either by a regular suit in the manner provided by Regulation IV. of 1793, or by summary process, under Regulations V. of 1812, or VII. of 1799, the provisions contained in the latter enactment, which was extended to grant some relief to Sudder Malguzars, and to enable them to collect with greater regularity revenues which they themselves were compelled to pay at stated periods, having been since declared to apply equally to kherajdars and lakherajdars, and to have been enacted for the benefit of both.

The nature of those provisions which direct the examination into the validity of titles to hold lands free of assessment, particularly of Section 30, Regulation II. of 1819, have caused in some Zillah courts a partial cessation in the trial of suits, have loaded the files of the collectors and commissioners, have depreciated the value of lakheraj property, and thrown difficulties in the way of transfers therein. I think it would be well worth the attention of Government immediately to depute extra hands into those districts which are placed in such a predicament. Shall each tenant be harassed, all property be placed in abeyance, and questions of distinct private right remain undecided, until the papers are eaten up by time, and the parties have departed to another world? Such was never, God forbid that I should make the accusation, the intention of the English

Government; nor is it so much ascribable to the tenure of their regulations, as to this—that those regulations are not at once carried into effect. Let those tenures which are invalid be resumed and assessed at once, and the question set at rest for ever; let the suits of *meum* and *tuum* be returned to their proper tribunals—in most cases they might be returned at once, without danger to the Company's revenue, the collector taking a note of the land, with a view to subsequent investigation, should such be deemed necessary. It is not contended but that the greater part of the titles to rent-free lands are invalid; and few, it is equally evident, will be able to pass through the strict ordeal which has been provided by Regulation XIV. of 182

And this leads me to consider:

1*st*. What are the various descriptions of tenure in lands lakheraj; and,

2*ndly*. What is necessary to their validity, according to the Regulation last quoted; and,

1*st*. Lakheraj tenures are stated by the learned and gallant author of the Law and Constitution of India*, to be—

* Law and Constitution of India, pages 72 et seq.

1*st*. *Altumgha*, which signifies a grant under the royal seal.

2*ndly*. *Mududmash*, or a grant for maintenance; a pension to an individual in distress.

3*rdly*. *Aimah*, a grant to maintain a priest or Imam.

4*thly*. *Jaigeer*, which is a military tenure for life.

The above are called Badshahi or royal grants, the provisions regarding which are contained in Regulation XXXVII. of 1793.—The three first of which, according to the author above-mentioned, were considered by the English Government as rent-free grants in perpetuity to the grantee and his heirs*, and transferable. The last, or Jaigeer, though "known to be merely a life-rent tenure, yet is stated to convey a rent-free title†."

* Section 15, Reg. XXXVII. of 1793, Altumgha, Aimah, and Muddudmash grants are to be considered as *hereditary* tenures.

† Jaigeers to be considered as life tenures, unless otherwise specified in the grant.—Section 15, do. do. It is observable, in reference to the remark of the author quoted in the text, regarding Jaigeers, that it is declared by Section 12, Regulation III. of 1828, that Jaigeers are *not to be held* as life tenures where the grant clearly conveys *an hereditary interest, and* vice versâ. In other respects, however, the law, as will presently be seen, has been increased in severity.

In addition to the above, other lands have been alienated by the Nazim or Zemindar, for charitable or other purposes, under the titles of 1, Nazir i Durgah; 2, Kharije i Jummuh; 3, Mafee; 4, Sir Shikan; 5, Nankar, and 6, Enam. Lands held by all these tenures are stated in Lord Teignmouth's minute, to which the author refers, to be in practice transferable, with the exception of those held under the Nazir i Durgah tenure.

The author likewise mentions 1, Chakuran; 2, Mohturan; 3, Peeran; 4, Fakeeran; 5, Cheraghee; 6 Burmootur; 7, Bhogootur; 8, Bhatootur; 9, Vishnootur; 10, Devottur; and 11, Nijote—all of which he states to be by their nature not necessarily hereditary, and by law, clearly not so—nor does it follow that any one of them conveys a rent-free grant. The provisions regarding grants other than Badshahi or royal are contained in Regulation XIX. of 1793.

2ndly. It remains to state the nature of the ordeal, in order to try the validity of rent-free titles, which has been provided by Regulation XIV. of 1825, which comprises with modifications the principal enactments contained in Regulations XIX. and XXXVII. of 1793, and by which the old law has been rendered almost as severe and comprehensive as the author of the Law and Constitution of India could possibly desire.

By Section 3, grants by which possession of land has been held uninterrupted from a time preceding the 12th August, 1765*, shall be held valid without evidence to the grant, and shall be *confirmed to heirs* when the nature of the tenure is *hereditary, according to the custom of the country.* Proof of possession and hereditary right must be advanced by the party claiming to hold as lakheraj; and although many successions to the tenure may have taken place, yet the title to an hereditary right is only to be established by the terms of the tenure itself, or by the admission of Government on a reference made for the purpose.

The Kings of Dehli, and the Subahdars of Bengal, Behar, and Orissa are, by clause 5, of the same Section, alone recognised as possessing the power to confer grants previous to the extension of the British dominion; other pleas of a grant having been made by a temporary or delegated authority, and which may appear well-founded, should be referred for the decision of Government.

Now in order that grants made or confirmed by the above powers be held valid, it is requisite under clause 6—

* I merely give the date for Bengal, Behar, and Orissa, to which provinces this treatise principally refers. The regulation is quoted from Mr. Prinsep's Abstract, vide pages 32, 33, et seq.

1*st*. That they were made or confirmed while the granting authority held the supreme power within the territory of which the lands form a part.

2*ndly*. That the grantee actually obtained posses-

3*rdly*. That the grant shall not have been resumed by Government previous to the British accession; or if resumed, that the authority of the officer resuming shall have been disallowed. And lastly—

In order that grants not made or confirmed by the supreme power, always excepting tenures of long possession as specified above, should be valid, it is necessary by clause 8—

1*st*. That they were made or confirmed by some authority directly acknowledged by the Governor General in Council, as competent.

2*ndly*. That the grantee actually obtained possession, and that the revenue was not subsequently resumed by competent authority†.

* Where grants have been made of jungle land, I have seen it contended on the part of Government, that *possession* could not be had; but certainly I should think, according to law and equity.

† *Registry* is also required to have been made in order to the validity of grants—by Code of 1793, and by Regulation II. of 1819.

These are some of the principal provisions which I find it necessary to abstract, and it will easily be perceived, how difficult—nay, how nearly impossible it must be for a grant to comply with all the conditions which by statute are required to constitute it a good and valid lakheraj title. The resuming officers, too, eager to display their zeal,—apprehensive, but surely without reason, that a decision in favour of validity will be looked upon by superior authority with a suspicious eye, and unable to divest themselves entirely of the character of prosecutors, though that office has now been shifted to a native agent of Government,—almost invariably give their opinions against the legality of the tenure, upon some point or other of the very clever and comprehensive Regulation to which we have above referred.

On the resumption of an estate under the process of Regulations II. of 1819, and III. of 1828, the Sudder proprietorship, as well as the engagements which said proprietor may have contracted with his under-tenantry, become cancelled. *Its share* of the produce of the land, before wrongfully assigned, the Government has now taken upon itself, and it will make such an assessment upon the state as shall be consistent with the produce and with the rights of the under-tenants—in conformity with the provisions of Regulation VII. of 1822; nor will the Government, excepting in special cases, admit as a matter of right, the

former lakherajdar to engage for the Government revenues, or continue him in possession of the Sudder tenure; except in the cases of Minhaidars under Regulation XIX. of 1793, or Canungos under those of Regulation XIII. of 1825, or the holders of Badshahi grants, under the circumstances stated in Section 4 of the Regulation last quoted.

II. *Questions relating to endowed lands are brought under dispute for the recovery of the revenues by which the religious endowment is supported, or for the recovery of the land itself, which is too frequently fradulently alienated. It will be sufficient that I briefly observe what are the Mahommedan and Hindu laws on the subject, and what provision has been made by the ruling power in Regulation XIX. of 1810. "An endowment†, says

* Macnaghten has remarked as incidental to the decision, in the case of the Collector of Moorshedabad *versus* Bishenath and Sheonath Rai, that lands held by a Zemindar for a religious appropriation of which he has the superintendence, are not considered to form part of the Zemindarry, or to be transferable by the sale thereof, provided the endowment is valid under the Regulations; also, that the Zemindar having made such endowment does not invalidate it, if antecedent to the Dewanny grant. See Sudder Dewanny Adawlut Reports, vol. i. pp. 175, 6.

† *Wakf* implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest, and consecrating it in such manner to the service of God that it may be of benefit to men. Provided always, that the thing

Macnaghten in his Principles of Mahommedan Law, signifies the appropriation of property to the service of God, when the right of the appropriator becomes divested, and the profits of the property so appropriated are devoted to the benefit of mankind." It is not a fit subject of sale, gift, or inheritance, except by order of the ruling power towards defraying the expenses of the repair of edifices, et cætera. The superintendent remains in office *quamdiu se bene gesserit.* The Hindu Law does not, that I am aware of, treat an endowment in a different light from the Mahommedan. By Regulation XIX. of 1810, the general superintendence of all lands granted for the support of mosques and Hindu temples is vested in the Board of Revenue or Commissioners, whose duty it is to see that all endowments made for the maintenance of establishments of the above description be duly appropriated, and the buildings kept in re-

appropriated be at the time of appropriation the property of the appropriator. See Sudder Dewanny Adawlut Reports, vol. i. p. 18.

Macfarlane in his Account of Constantinople, in 1828, states, that the tenure of Wakf is gradually absorbing the whole of the landed property of the country, it being appropriated in that way, in order to its being possessed in security; the general custom is, to devise it to some heir or set of heirs, and in default of him or them, to a mosque.

Tow[illegible] implies the consignment of the thing appropriated by the appropriator to another person, for the purpose of such person's applying it in the manner *designed.*

pair. It is made incumbent on the above authorities to prevent the conversion of any land granted for the above purposes to the private use of individuals, or their appropriation in any mode contrary to the will and intent of the grantor. Further provisions are contained in the regulation to the end, that the revenue authorities should render themselves acquainted with the state of the endowments in their several districts, and in some instances the appointment of a superintendent *de novo* is vested in them. The collector and register are usually appointed local agents under this regulation.

Now when the superintendent of a religious endowment sues to recover lands which have been illegally alienated, the plaint sets forth the land in dispute to be part and parcel of that included in the Sunnud or grant, by which the establishment was originally created, asserts immemorial possession, and claims to recover the same; and this being proved, it is undoubtedly the duty of the court in ordinary cases to pass a decree in favour of the plaintiff. But it often happens that the action is brought after a long period, after the property in question has passed from the hands of one individual into those of another, when to decree the suit would lead to actions innumerable, in order to recover the valuable consideration which may have been respectively given. The property has moreover been held for a period

of 12 years under a just and honest title believed to have conveyed a right of possession, and which therefore, under Regulation II. of 1805, cannot be disturbed by the civil court. For these and other reasons, and notwithstanding the good intention of Regulation XIX. of 1810, numerous lands set aside by the grantors for the maintenance of colleges and use of religious endowments have been alienated, and their profits embezzled by the grantees or their heirs, or other individuals, being trustees or managers, whereby the intentions of the grantor have been frustrated, and the use of the lands fraudulently and illegally perverted and estranged*. I would interpose the strong arm of the criminal law, and visit such unlawful conduct with a penal enactment: I would make the local agents parties to suits for the recovery of lands so alienated, such suits only to be barred by a lapse of sixty years: I would facilitate the resumption and re-union of such lands, by extending to their benefit Section 5, and the 15 subsequent Sections of Regulation II. of 1819, as modified by the 3rd enactment of 1828, leaving all parties aggrieved by such re-union and resumption to a regular suit in the Dewanny Adawlut. Thus rendering those provisions serviceable, as well in re-uniting the lands of my Mahommedan and Hindu countrymen and preserving

* It is the practice to grant them as Muddudmash to the wives or concubines of the superintendent, whence they are never returned to the original tenure.

their religious institutions, as the tolerant spirit of the age demands, as in trying the validity of, and resuming for the state, those very lands when supposed to be holden on invalid titles.

Little remains to be stated in reference to the forthcoming chapter. Having received retainers frequently in matters heard before collectors, and having had some chamber practice in points relating to Malguzarry lands, I launch forth my frail bark not without some fear of her success, but confident that I am, from my anomalous situation, from my lack of a legal education, and above all from my real desire of advantaging the junior servants of my honorable Masters, deserving of the humane consideration of those readers who may honour these pages with a perusal.

CHAPTER II.

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Head I.

I. The first suits relating to land and its revenue which I shall consider are those brought for the purpose of annulling the sale of lands assessed in perpetuity, or connected with that subject. The estate of Mahommed Sharif having fallen into arrears, it has been found necessary under the Regulations in force to proceed to its sale, in order to recover the revenue assessed thereon. Now the defaulter is at liberty to contest the validity of such sale; for by the 25th Section of Regulation XI. of 1822, the consolidated enactment regarding the sale of lands, it is provided, that although the Board of Revenue, or other authority exercising the powers of that board, shall confirm the sale, it shall nevertheless be competent to the former proprietors or any of them to institute a suit in the civil

court to contest its validity; and if it shall be established to the satisfaction of the court, that any one or more of the conditions (which I shall specify below), declared to be essential to the validity of a sale, have not been observed, it shall be competent to the court to annul the sale; provided, however, that the court shall not admit or take up any such plea, unless the same shall have been urged by the party in his petition to the board, or unless the failure to do so be satisfactorily accounted for. If, by Section 26, the party suing shall fail to establish to the satisfaction of the court that the sale is invalid by reason of the failure of any of the said conditions, the suit shall be dismissed. But, if it shall appear to the court in which the decision may be passed on the original suit or in appeal, that the proceedings of the collector or any of his officers have been improper or irregular, and that the plaintiff has been endamaged from that cause, it shall be competent to the court to adjudge such damages* to the plaintiff, as may appear equitable, in compensation for the injury sustained by him; and in such case to declare, whether the damages shall be paid by Government, or by the collector personally, or by any of his officers. Provided also, that it shall in such cases be competent to the court to submit to the Governor General in

* This action for damages is referred to under Head VII. chapter 1.

Council, a recommendation that the estate sold should be restored to the plaintiff, with a statement of the compensation which it may appear equitable to allow to the purchaser, recording the same with the reasons for it at length in its decree; and whenever a case may be so submitted by any court, and no appeal may be lodged against the judgment, it shall be competent to the Governor General in Council, if he shall be satisfied that the case is one justifying such an interference, to cause the estate to be restored to the plaintiff on his making the compensation recommended; but if the purchaser shall desire to retain his purchase, and the case be open to a regular appeal under the general regulations, the purchaser will of course be at liberty to appeal to the court possessing appellate jurisdiction, in order to contest the propriety of the recommendation submitted to Government or any part of it. In such case, the decision of Government will be suspended until the final judgment be passed. But if the purchaser shall merely contest the adequacy of the compensation proposed to be assigned to him, it shall be competent to the Governor General in Council, if he shall resolve to adopt the recommendation of the court passing the original decree, immediately to order the restoration of the estate to the former Zemindar, on payment of the amount adjudged to be due, as compensation to the purchaser; and in such event, the fee payable on the institution of appeal shall be calculated in the differ-

ence between that amount and the sum claimed; but the appellant shall not be entitled to judgment in any other point than that pleaded, viz. the adequacy of the compensation adjudged: in such case, the estate shall be held to be mortgaged in security for the eventual judgment. By Section 27, it is further declared, that no person shall be entitled to contest the validity of a sale, after having received any part of the purchase-money—and that no part of the sale-proceeds of any estate shall be liable for the debts of the late proprietor, whilst the validity of the sale may be under contest*.

The conditions required for the validity of public sales, as set forth in Section 5, Regulation XI. (modified by Regulation VII. of 1830,) are as follows:

1*st*. That the lands or Mehal sold form the estate on account of which the arrear has accrued, or are parcel of such estate, and are liable to sale in con-

* Clause 2. Estates never to be restored to the former proprietor, unless the whole arrear be discharged—the purchaser to be entitled to interest on his purchase-money restored, recoverable from defaulter.

Purchasers under fictitious names, or revenue officers, liable to fine of 25 per cent. on purchase-money; sale to be cancelled, if within two years from date at which it was made, and purchaser to receive back three-fourths of the purchase-money. Sections 20 and 28, Reg. XI. of 1822.

formity with the principle and provisions declared and enacted in this regulation; or, if not the estate or parcel thereof as aforesaid are the property of the defaulter or his surety, or being the property of such defaulter or surety, have been specially pledged to answer the demand in arrear.

2ndly. That permission to make the sale shall have been received from the Board of Revenue previously to the day of sale.

3rdly. That due notice of the demand, and of the intention to sell, as well as of the time and place of sale, shall have been given.

4thly. That some part of the amount demanded in the notice, or of the interest payable thereon, shall be due at the time of the lot being put up†.

5thly. That the sale shall be made at the time and place stated in the advertisement, and with due publicity and freedom.

Actions then of the nature we are considering will be brought upon the plea that one or more of the above conditions has not been complied with, and

† It is not imperative on collectors to receive balances, even if tendered, after the lot has been once put up.

under such circumstances only can the sale be declared void by the civil court. Nor is it a sufficient plea, by Section 11, Regulation XI. of 1822, that the arrear accrued while the engager was divested of possession, either by the act of an individual, or by the order of a court of judicature, or by attachment by a revenue officer. Nor by Section 24, Regulation V. of 1812, that some of the sharers never obtained possession of their interests in the property. Nor by Section 25, that the proceeds of the sale have materially exceeded the amount of the arrear due;—but although the sale need not be by law annulled, yet in certain instances the courts may decree damages to former proprietors, and recommend it to the Governor General in Council, to restore them to their estates, the important provisions regarding which have been at full length above recorded—and by Section 4, Regulation XI. of 1822, persons aggrieved by any act connected with sales, but not amounting to irregularity sufficient to make the sale invalid, are further declared entitled to an action for personal damages against the individual aggrieving him.

By clauses 3 and 4, Section 28, Regulation XI. of 1822, disputes as to the extent of purchase between purchasers and the late proprietor, also between the purchaser and a third party, are to be settled by suit in the Adawlut: if, in the latter case the suit be decided in favour of the third party, costs shall be made

payable by the late possessor, who is to be sued conjointly with the purchaser; and such late possessor is moreover to be compelled to make adequate compensation to the purchaser.

The only apposite cause which I find in the reports of the Sudder Court, is that of Bugwant Singh, pauper, appellant, *versus* the collector of Goruckpore and others*. One of the Sudder judges, on an attentive consideration of Regulation XI. of 1822, found, that none of its provisions affected that case, to which Mr. Macnaghten has appended the following note: "The 3rd clause of Section 7, requires that notice of an intended sale shall be sent by a single peon to be published on the estate or in the Mofussil, in the manner therein pointed out: and the 4th clause goes on to state that, no sale shall be liable to be annulled on the ground of any insufficiency in the notice given, provided it be satisfactorily proved that the copy of the notice required to be sent to the court for publication, was received by the judge for a period of thirty days prior to the date of sale, and provided there be sufficient evidence that the notice directed to be sent into the Mofussil, was received by the parties, or by their managers or agents on their part, or was published at a public Kutchery, after the manner provided, on a date prior to that on which the sale may have taken place, by not less than twenty days,

* Reports of Sudder Dewanny Adawlut, vol. iii. p. 325.

or provided it be satisfactorily proved by other circumstances, or there be sufficient ground to presume, that the defaulter was fully aware of the demand being outstanding against the Mehal, and of the intended sale, for a like period preceding. In the present instance, the required formality was not observed, nor was there reason to suppose that the defaulter was aware of the demand for the prescribed period." The court set aside the sale, however, on the ground that sufficient notice had not been given in conformity with the provisions of Section 5, Regulation XXVI. of 1803.

HEAD II.

II. A second action relating to land and its revenue is, when a perpetually settled estate having been exposed for sale in liquidation of arrears of revenue the arrear is paid by one of the sharers, such sharer now sues his parcener or parceners for the recovery of their several portions of the arrear which has been dircharged by him. For, the plea advanced by any one of the sharers, to stay the sale on the ground that he is prepared to pay up the balance which has accrued on his own individual share, but that the other sharers illegally continue to withhold their quantum, cannot be listened to by the revenue authorities, in cases of joint undivided estates; unless when a Butwara or division of the property shall have been commenced,

under Regulation XIX. of 1814, the consolidated enactment regarding the division of estates; by the 8th Section of which it is directed, that the public revenue shall be assessed upon each portion into which the property shall be ordered to be divided, in conformity with the rules prescribed in Section 10, Regulation I. of 1793, which are as follows:

"From the limitation of the public demand upon the lands, the net income and consequently the value of any landed property, for the assessment on which a distinct engagement has been, or may be, entered into, between Government and the proprietor, will always be ascertainable by a comparison of the amount of the fixed Jummah assessed upon it, with the whole of its produce, allowing for the charges of management: but it is also essential that a notification should be made of the principle upon which the fixed assessment charged upon such estate will be apportioned on the several divisions of it, in the event of the whole of it being transferred by public or private sale or otherwise, in two or more lots, or of a portion of it being transferred in one or in two or more lots, or of its being joint property and a division of it being made amongst the proprietors—that is to say, the assessment on each portion shall be fixed at an amount which shall bear the same proportion to its actual produce, as the fixed assessment upon the whole of the lands may bear to the whole

of their actual produce." Estates under Butwara can, by clause 3, Section 3, Regulation XI. of 1822, be brought to sale only at the close of the year, and then in conformity with Section 33, Regulation XIX. of 1814, the collector will sell only the shares of the defaulting sharers.

To proceed to sale under circumstances as above-noticed, is no doubt accompanied with harshness and injury to joint proprietors; but I conceive it absolutely necessary to the punctual realization of the revenue under the permanent system. Amongst the fraudulent practices to which it leads, are the following:—One sharer by withholding his portion of the revenue, and bringing the estate to sale, is enabled to purchase the Sudder Malguzary right of the whole, by means of a Benamee purchase! The estate too, purchased at public sale, becomes liable to the provisions contained in the Regulations regarding the enhancement of rents and the affection of the intermediate tenures. Individuals holding under weak titles, unable perhaps for various causes to obtain possession, thus attempt to validate their titles, and obtain the assistance of the strong arm of the statute law.

It will not be foreign to this branch of my subject to make some observations on the different kinds of Sudder proprietors existing under the Zemindarry tenure, and the modes in which they may be created.

Proprietors are either *apparent* or *Shikmee*. *Apparent*, recorded as proprietors on the books of the collector. *Shikmee*, whose names are not inserted in the Inticali register, but who nevertheless possess the right of collecting and liquidating the Government dues. Again, proprietors differ in the manner of their tenure—"enjoying*, in some instances the full heritable and transferable property of the land for which they have engaged; in others, a heritable and transferable property in the rents demandable from their under-tenants, yet possessing only a restricted right of ownership in the soil, with reference to the tenures of Khoodkasht Ryuts and Mourusi Talukdars. Again, Sudder Malguzars, and in some cases the mere representatives of Government, possessing the right of collecting the Sircar's share of the produce, —allowed a right of property in the incidents of their management, but none in the soil; and in other cases, they possess a portion of the Mehal in full proprietary right, while the rest is occupied by other persons enjoying an equal right of property, subject, until regular separation, to the payment through the Sudder Malguzar of the Kheraj of the Sircar." But these are not one-half of the changes which might be rung (and are rung in the minute from which I quote) on the Zemindarry tenure. Into how many divers ramifications does it not extend? I have recounted

* I quote from an exceedingly clever Government minute in the Territorial Department, under date 22nd December, 1820.

them as some of the principal, and each may be multiplied and divided into itself times innumerable, so that amidst the various forms which it assumes, it is impossible to recognise the Proteus of former times; And Sudder Malguzars may be created—

1*st*. By inheritance. The heirs of Haniff or of Boloram will succeed him on his demise, according to the Mahommedan or Hindu law as the case may be; they will apply to the collector of the district by miscellaneous petition, with a view to having their names inserted in the book of mutations in the place of the late apparent proprietor. On the petition notice will be issued, inviting any other person who may consider his right superior to that of petitioners to come forward and state his objections; if no one come forward, the collector will make a proceeding in compliance with the prayer of petitioners; if objection be offered, the collector will use his discretion, referring the petitioner, in cases of difficulty, to a suit in court to establish his claim; and hence originates that action denominated in the language of our native lawyers "Mucadamah berai Inticali," to which however it will not be necessary to assign a separate station in this treatise. Now heirs, it is clear, may succeed either to an estate whole, or merely to a portion thereof, the remainder being already registered in the names of other co-proprietors. Heirs too may be one, or more than one—generally more than one, amongst

Mahommedans; amongst the Hindus, oftentimes the registry is in the name of the elder brother only—for although the right of all be equal in ancestral property, it is frequently the custom with that patriarchal race, by common consent, to make the proprietorship of only one brother *appear*, and to vest the *Surburakarship*, or management of the property, in him. And with reference to the numerous disputes and confusion arising from the number of proprietors in each Mehal; with advertence also to the frequent applications for Butwaras to which these disputes give rise, but which Butwaras, in consequence of the difficulty of procuring authentic documents, and of the impediments thrown in the way by those sharers who are opposed to the partition, are seldom satisfactorily completed, I wish that it had been provided by statutory enactment, that perpetually-settled estates should descend to the eldest son alone, or to the next heir male*. It might be made incumbent on the possessor to provide for the maintenance and giving in marriage of the female branches of the family. Thus perpetually-

* In the case of Ishanchand Rai, *versus* Ishanchand Rai, Sudder Deawnny Adawlut Reports, vol. i. p. 2, referred to by Macnaghten's Hindu law, vol. i. p. 7, a Zemindarry was held in the light of a principality, and only on this ground was a gift in the nature of a will, by which the Zemindar of Nuddea settled the whole of it on his eldest son, subject to a pecuniary provision for the younger sons, good and valid. I wish the principle had been extended however to all Zemindarees.

settled Mehals would have remained to a greater degree entire and undivided, and in conformity with the wishes and intention of the Marquis Cornwallis, the aristocracy of the country, fast dwindling into worse than a democracy, would have been regenerated and preserved. All matters of succession and alienation in the inferior tenures would of course have been guided by the same rules as formerly, and Lakheraj tenures would have descended according to the custom and established law of the country. No Butwaras would have been allowed, the estate appearing on the Government records as belonging to one proprietor alone. In the case of Hindus the younger brothers would have continued to participate in the Wasoolat or profits. Macnaghten has remarked*, that "In ancestral real property the right is always limited, and the sons and grand-sons of the occupant, supposing them to be free from those defects, mental and corporeal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself, so much so that he is not at liberty to alienate it except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another." Now this is clearly a species of entail, but considerable violence must have been done, it is true, to the Mahommedan law, in effecting an alteration of the kind we are considering—and how much

* Volume i. p. 2, et seq.

more difficult has it now become to effect a change, so desirable, in order to prevent a minuter subdivision of property, and the addition of more complicated rights and interests than are already in existence!—For at the present day few estates remain entire and with one proprietor, or rather with one family of proprietors; they have become broken and divided by means of summary separations or Kharij dakhils, and also by process of regular Butwara. Individuals with opposite interests holding under every diversity of tenure, have been introduced by the operation of sale of fractional portions, or by decrees of court, and heirs in the course of time have succeeded to the exact amount of tenure which their ancestors enjoyed.

2*ndly*. Proprietors may be created by private purchase; under which term I would be understood to mean all private transfers and alienations, as contra distinguished from sale by public auction; and the process before noticed being adopted in this case, the proprietor will be entitled to be recorded in the register of mutations.

3*rdly*. By purchase at public auction, which may be either of an estate whole, brought to sale for arrears of revenue, in which case the purchaser will succeed to the fullest and most complete title by law allowed, or, of the rights and interests in a portion

thereof, which may be either in satisfaction of security bonds or of decrees of court, in which case no additional rights are created, but the purchaser will succeed to those which his predecessor enjoyed*.

4thly. Proprietors may be created by decree of court, as if an estate which was in A, has been found by judicial decision to be in B, the court will send its precept to the collector requiring him to register the name of B, in place of that of A; and in the event of appeal and of no specific order from the Adawlut, the collector will receive the Government Kheraj from such of the parties as is willing to pay it, and to grant at the same time adequate security to answer any eventual demands against him. Should neither

* The distinction between a proprietor coming into possession under public and *private purchase* is well marked by clause 2, Section 3, Regulation XVIII. of 1812, which enacts that, in Butwara, the revenue shall be apportioned on the several shares without regard to any engagements which may subsist between the proprietors and their dependent Talookdars (excepting those described in Section 7, Regulation XLIV. of 1793,) under farmers or ryuts; but all leases made in conformity to Sections 2 and 3, Regulation V. of 1812, and Section 2, of this Regulation, that is if granted not beyond the interest of the grantor, shall remain in full force, notwithstanding the division of a joint-estate among the sharers, or the sale of the whole or a portion of any state in satisfaction of a decree of court, or the devolving of the same by inheritance or the private transfer thereof by sale, gift, or otherwise.

party be able to find security, it will be the duty of the collector to depute an officer to collect the rents on the part of Government, in conformity with the Regulations in force.

5thly. Proprietors may be made by the orders of the Revenue authorities, with the confirmation of the Governor General in Council;—as in the case of minor Zemindars, when their estate has been taken pro-tempore into the hands of Government, in conformity with the provisions of Regulation X. of 1793, as modified by after enactments. For although the minor Zemindar has become proprietor on the demise of his ancestor, yet his right is as it were suspended till such time as he shall arrive at years of maturity, his estate being in the interim farmed out to the highest bidder, and himself maintained with the surplus proceeds.—And again, on completion of a Butwara between three joint proprietors, their names will be registered each as proprietor of his divided share; and thus a right of proprietorship, though before existent in all conjointly, will be separately and individually recognised in each: and furthermore, the right of Sudder proprietors is sometimes renewed and restored under the circumstances before related, in conformity with Section 26, Regulation XI. of 1822*.

* See Chapter ii. Head I.

6thly. The grounds of opposition offered to Inticali originate in various causes, arising from the different transfers of landed property; as in cases of sale, that the seller had no right to sell; in case of Hibah, that he had no right to give; in cases of Tamlik, that he had no right to will; in cases of inheritance, that he is not the heir. In cases of precepts founded on judicial decisions, that he has appealed; in cases of public sale, that the sale is illegal, or that he has instituted a suit to annul it. Now in intricate points having reference to private alienations or claims of inheritance, it is usual to refer the parties to a regular suit: in cases of precepts the collector will act under the directions of the court, guided by the law of appeals and by the furnishing of the required security. In cases of alleged fraud in the purchase, the collector will investigate into the circumstances, and procure, if illegality be proved, the annulment of the sale through the Board of Revenue; and in cases of the institution of a suit, the name of the purchaser will be registered notwithstanding, in expectance of the final decision of the Adawlut, or of the Government, on the recommendation transmitted by the court.

7thly, and lastly, what are the effects of Inticali? The individual whose name is thus registered, becomes the Sudder Malguzar, answerable to the state for the payment of the revenue assessed upon his

property, and is admitted to proprietory right in all the variety of tenure to which we have already adverted; moreover, in case of the sale of the estate for arrears he has the right, in common with the other registered, or apparent proprietors, (a right which however is often shared by Shikmee proprietors,) to the surplus proceeds of the sale in proportion to the amount of property possessed by him.

Shikmee proprietors in like manner owe their origin to the various modes of purchase and to transactions inter se, in consequence of which they collect the revenue and share the profits of estates; and frequently, when the right to partition, or to share in surplus proceeds of sale* is called into question, an innumerable host of these may be seen, as it were, issuing from the Mofussil, ready to assert by oral or documental proof, their rights to a certain extent of property in the Mehal: content before to enter their shares of the Kheraj, through their own agents, or through other apparent proprietors, they now aim to appear as owners themselves, partake of the privileges, and become registered as such accordingly. And the practice of Inticali runs through the whole of the inferior Talukdarry and Ryutty tenures of the Zemindarry, it being the custom of the Zemindar to register all changes on the reception of a Nuzzerana.

* Or liability of defendant's lands or rights and interests for debts.

It is hoped that the reader will pardon this digression, which I deemed necessary in order to the better understanding of this and other revenue suits. The action which we set out with considering, may be brought by both apparent and Shikmee proprietors. The proof required is as follows:

1*st*. That the amouut sought to be recovered was actually paid into the collectorship as stated in the declaration. This may be proved by parole evidence, or by the Dakhilah, or receipt given by the collector's officers to the complainant; and this latter will be generally tendered in evidence, because it is the interest of the plaintiff to demand it, and to take care that the name of the Marfatwar or person through whom the rupees were actually paid is duly inserted*; or by a bond for the amount given on the

* Those individuals only whose names are inserted in the Inticali register are considered by the revenue officers in the light of proprietors, though payments are frequently made through persons calling themselves Marfatdars and others, possessing not an apparent, but a Shikmee right of property. All Dakhilahs should be headed with the names of the registered proprietors and the appellation of the estate; the name of the Marfatdar should likewise be inserted; and collectors should be careful to superintend the conduct of their native officers in granting Dakhilahs, because they may be afterwards advanced to prove the payment of a larger portion of the Government rental, than has in fact been paid, or the existence of a proprietory right which does not appear from the records of the collectorship.

day of sale, for money-lenders are always in attendance, either for the purpose of granting loans to proprietors in distress, or of making temporary purchases of Mehals, with a view to the after-settlement of the matter with the late possessors for a valuable consideration.

2ndly. It having been proved in the first instance that the sum has been actually paid, it will remain to ascertain how much is payable by both plaintiff and defendant; for supposing the Sudder Jumma of the estate to be 200 Rs. and A and B, as stated by plaintiff, to be proved to be equal sharers, it is clear that if A has paid 200 rupees, he has paid 100 more than his share, and his action will lie for such sum in excess. But I have seen it pleaded to this action, that the share of A was more valuable than that of B; in other words, that A is in justness bound to enter a larger quantity of the Government Kheraj than B, that the Sudder Malguzary right of B does not exist to the extent alleged by A, and thus that A has paid nothing in excess; and then it is material to the issue to ascertain the respective rights and interests of the parties. In the case of apparent proprietors, this information may be obtained from the Huzzoory receipts; or from the records of the collector, in cases of Shikmee proprietors: in some instances by those receipts likewise, where the Marfatwar is expressed, but principally by the Mofussil Towjis or

accounts, and by evidence of right, oral and documental.

Head III.

III. A third suit of common occurrence in Zillah courts is that brought to rescind a Chitta or to amend or alter it. I will first state the nature of the Chitta, and then observe on the different kinds of Chitta which are made subjects of contention.

"The Chitta is an account of all the lands in the village, divided numerically into dags or shares; it contains the quantity of land in each dag, the species of cultivation, and the name of the ryut to whom it belongs*."

Chittas may be classed into,

1*st*. That important Chitta which exists in certain districts, by which the lands of the Sudder Malguzars were defined preparatory to the decennial settlement of 1790,—a document of the highest importance, both with reference to former and future measurements, from which all other Chittas spring or on which they are founded—to the preservation and authenticity of

* Smyth's Zemindarry Accounts: the same gentleman has also given an explanation of the terms and abbreviations used in Chittas.

which, therefore, the strictest attention of the revenue officers should be enjoined. Now, it is asserted on the part of the Zemindar, that in the Chitta in which his Zemindarry is comprised, Dag two, has been placed where Dag three should really be, or dendo inserted for dendu, or that a neighbouring Zemindar has encroached upon his estate; action is then brought to rectify or annul the Chitta, and the issue is determinable on the merits, by the documents of the parties, and frequently by the deputation of an Amin for the purpose of instituting a local investigation.

2ndly. The Chitta, made of lands reclaimed from the waste or gained by alluvion or dereliction, with a view to their ultimate assessment. I allude to lands other than those included in the perpetual settlement, but frequently claimed as such by Zemindars and thus brought *sub lite;* in which case the revenue officer is included amongst the defendants. Is the land part of the Zemindarry of Trahi Ram, or has it been reclaimed from the waste in excess of that, and may the state assess it with Ramjoy? An issue difficult of decision, because of the unsatisfactory nature of those documents upon which the investigation proceeds, and of the fear of trenching upon (the generally exorbitant) claims of the Malguzars of 1793, but which is most surely determined by the deputation of a trustworthy Amin, if such can be procured.

3rdly. And whereas the two descriptions of Chitta which we have above considered, are as it were between the state and the Sudder Malguzar, a third division of the Chitta may be said to be, that constructed between proprietors and their under-tenants, or between the under-tenants *inter se,* consequent on the loss of the former documents, on the more minute subdivision of the under-tenures, for the purpose of enhancing rents, or for other reasons.

4thly. The Nilami Chitta, or that constructed by amins taken out from the courts by purchasers of perpetually settled estates, in order to measure and define the property purchased: which course of procedure is allowed by Section 28, Regulation XI. of 1822; and,

1*st.* Of entire estates. Under the Regulations as at present constituted, an entire estate only can be sold for arrears of revenue, excepting estates which are suffering a partition or Butwara, under Regulation XIX. of 1814, in which case the actual share of the defaulter, as proved to exist by the completion of the Butwara, is offered for sale; nor is the assistance of the court, except with the view of accelerating the process of the revenue department, required in this case, because an Amin has already been deputed to make the partition, and the share of the purchaser

will depend upon such partition when completed and affirmed by the proper authority. It is the duty then of the Amin to construct the Chittas of estates whole, sold by public auction, so as to correspond as nearly as possible with the measurement papers of 1790, where such exist, or with the state in which the property was at the period of the decennial settlement. The purchaser, so it is declared by the Regulations, is entitled to receive the property in the condition in which it was at that period, freed of all incumbrances, save the payment of the Government revenue, and of all restrictions save those, by which the rights and interests of that class of under-tenants possessing a permanent and hereditary title of occupancy are defined and protected. The assessment remains unaltered; it is clear that the same capability of bearing it should continue to exist. It is frequently of great difficulty after the lapse of many years to define the limits of Zemindarries, claims are set up by the dependents and servants of the Malguzar last seised, or a portion is boldly claimed by him as free from assessment. He refuses a sight of his documents, and throws obstacles in the way of the intruding purchaser. It is said in the preamble to Regulation XIX. of 1793, and I mention it in order to evidence the principle upon which it is deemed necessary to preserve Zemindarries entire, and also to guide the decisions of the courts having reference to the point, that if a Zemindar makes a grant of any part of his

lands to be held exempt from the payment of revenue, it is considered void, from being an alienation of the dues of Government without its consent, and no doubt all such grants on the estate going into the hands of a purchaser by public sale for arrears, are *per se* resumed. Hence, opposition on the part of the retainers and servants of the last possessor, and hence numerous and often frivolous pleas are set up to rescind Nilami Chittas. In some instances the plaint asserts the land to appertain (here the action often stands on respectable grounds) to a second Zemindarry, the lands of which have been improperly recorded as part of the purchase by the Amin deputed.

2ndly. Of rights and interests—and these may be sold either in satisfaction of security bonds or of decrees of courts; and they may be,

1*st.* Rights and interests in entire estates—as the rights and interests of Mirza Mahommed in turf or Zemindarry Sherepore.

2*ndly.* Rights and interests, in a specified portion of an undivided estate, as the rights and interests of Mirza Mahommed in a two-anna share of Pergunnah Midnapore, in which case the obtaining possession does not usually go to the actual land, but to the interchange of engagements with the under-tenantry, or to the partition of the Towjis amongst the proprietors themselves.

3rdly. Rights and interests in a specified portion of land, as of Mirza Mahommed in 50 beegahs in Mouza Juanpore; and the Amin will put the purchaser in possession of such beegahs, recording them in Chitta papers, but no assessment will be apportioned thereon without a regular Butwara.

5thly. And lastly, Chittas may be constructed by the civil courts unconnected with the process of the collectorate—as of rent-free lands, sale of which has been directed by the court itself in satisfaction of its decree, in conformity with the provisions of Regulation VII. of 1825. The disposal and general supervision of Kheraj lands being vested in the revenue authorities, power is given by that enactment to judicial officers to effect sales of small portions of Lakheraj lands, in the same manner as of personal property, through the Nazir or Sheriff. Of lands, the proprietory right in which has been transferred by judicial decision from one individual to another, and which it becomes necessary to define in consequence—Of Talukdarry, Putnee, and Ryutty tenures, which may also be brought to sale in satisfaction of debt, or arrears of revenue, by the intervention of the Adawlut.

Head IV.

IV. Of the action to rescind a Jummabundee. The Jummabundee, says Smyth, in his Zemindarry accounts, is prepared in a form, showing the quality of the land, the quantity, the rate, and lastly, the total rent according to the rate demandable from each individual ryut. It is the general deed of assessment between Sudder proprietors and their under-tenants, in some few instances of intermediate Talukdarry tenures, precluding the necessity of a Potta and Caboul-liet, the simpler forms of agreement, but more frequently laying the foundation for the same. Now I may observe in the first place, that Jummabundees may be of two descriptions: 1st. Those concluded between the state and the Sudder proprietor; 2ndly, Those concluded between the Sudder proprietor and his under-tenantry.

1*st*. *And first*, Jummabundees may be entered into by individuals with the state through the agency of the collector of the district; and this cannot, at the present day, be of Zemindarries, because their assesment has been declared permanent by Regulation I. of 1793, except indeed where the lands may have escheated or been forfeited to Government, in which case, the ruling power, unless it shall see fit to make the collections itself, will constitute a Sudder Malguzar *de novo*, but will not, under the express directions

of the home authorities, again assign away to him proprietory right in perpétuity. Again, individuals may be admitted to engage with the state for rent-free lands which have been declared liable to resumption*; but I allude more particularly to Jummabundees for lands reclaimed from the waste or gained by alluvion or dereliction, and which are contested on grounds such as the following: the Revenue officer being introduced amongst the defendants—Seyud states in his plaint, that there are ten beegahs of land situate in Mouza Futtehpore, and comprised within certain boundaries (which boundaries the judge should always be careful to have inserted in the body or at the foot of the plaint, inasmuch as they are sufficiently difficult of ascertainment without the addition of the doubts consequent on a non-specification of them, "*ne per scripturam aliqua fiat dubitatio,*" is a maxim of law) this land, he, plaintiff, declares that he reclaimed from a state of waste; that he and his ancestors have possessed it from time immemorial; that Omar never possessed and has no right to the land, but that it has nevertheless been improperly measured as belonging to said Omar, and unjustly assessed by the collector with him, to the great endamagement of plaintiff, who prays accordingly that the Jummabundee be rescinded. The reply of the collector usually upholds the correctness of the assessment, while Omar the co-defendant will plead that he

* See p. 75—6.

has entered into engagements with the collector and paid into the exchequer with regularity the stipulated revenue, or will set up a counter-claim on the merits, to the effect that the lands were reclaimed from the waste by him, and are therefore properly assessable with him. Now these suits most frequently have their origin in the venality and corruption of the Amins first deputed to make Chittas of the land in question; and although it often happens that the plaintiff has allowed his right to elapse by negligence or laches, yet it more frequently appears in the course of judicial inquiry, that he has in fact been injured, and that a perfect stranger, perhaps a friend or relation of the Amin, has been illegally foisted into the Sudder Malguzarry-ship, in which case the court will pass a decree in favour of Seyud, and direct the collector to alter the engagements already made with Omar. If immemorial possession be asserted on the part of Omar, witnesses will be adduced by both parties, it rests with the court to decide on their credibility: written proofs are rare in this description of case, because revenue has not hitherto been received by Government and rarely by individuals for such lands, and consequently no written proofs of possession are forthcoming. The judge must decide on the evidence as to acts of possession; and no doubt, in order to arrive at a correct decision, it will be material to ascertain which party was present at the time of the measurement, and which has already

concluded engagements with the state. Jummabundees may also be contested on the ground, that the assessment which Government desires to conclude is excessive—or by a third party, that the land engaged for forms part of another tenure, either kheraj, or lakheraj, in which latter case however the more general course is to strike at once at the root of the evil by an action to rescind the Chitta, as narrated under the preceding head, upon which the Jummabundee has been founded.

II. Of Jummabundees entered into between the Sudder Malguzar and his under-tenantry, Talukdars and ryuts—in discussing which part of my subject, it will be proper that I make a few observations on those tenures as existing under the permanent settlement.

1st. *And first.* Of tenures *intermediate* between the Sudder Malguzar and the ryut, of which class the greater portion are denominated Talukdars. The distinction between independent and dependent Talukdars* has been removed by the operation of the permanent settlement, all those independent Talukdars who considered themselves entitled to

* *Hussoori* and *Muzkoori*, the former holds his lands of, and pays his rents immediately to, Government; the latter holds them under the Zemindar or Chowdry to whom he pays the revenues.—Rousseau's Vocabulary.

rank as Sudder Malguzars, having been, some at the period at which the settlement was formed, others in after times, with the assistance of the courts*, admitted to that right and to the privileges which accompany it: it will remain then to consider the different kinds of *dependent* Talukdars existing under the Sudder Malguzars and paying revenue to them or through them; *dependent*, as not being tenants in chief; though frequently *independent* in the character and privileges of *their order*, and

I. *The first class*, I shall denominate Istimrari Talukdars.—Although these tenants, from not having asserted their rights at the period of the settlement or in after-times, continue dependent on the Zemindarry from the lands of which their Taluks are formed, yet they are secured from an increase of assessment by right of hereditary prescription. The Talukdar is in possession of an Istimrari right entitling him to hold at a fixed rent, nor can he be ejected from his tenure while he continues to discharge the same. But should an arrear accrue, his tenure may, under Section 15, Regulation VII. of 1799, be attached—and if of a saleable nature be brought to sale at the close of the year, by application to the court. It may likewise be attached on the institution of a suit for arrears, under Section

* See the Reports of the Sudder Dewanny Adawlut *passim*, wherein it was litigated whether Talukdars were entitled to separation or not.

18, Regulation VIII. of 1819, but not being a *limited intermediate interest*, I should think that it could not be cancelled under that enactment on an arrear being adjudged to be due by summary suit. Perhaps, though such does not clearly appear, it may be disposed of in the same manner as Khoodkashto rights at the close of the year, to the exclusion of the defaulter, by the authority of the court—at any rate it may be sold, subsequently to a decree obtained in a regular suit, in satisfaction of the same. In the case of Chinta Moni Mastafee, *versus* Durup Narain Rai*, the claim to the right of holding lands at a fixed rent in a Zemindarry purchased by the defendant was adjudged in favour of plaintiffs, in proof of an Istimrari tenure and in conformity to Section 49, Regulation VIII. of 1793, by which dependent landholders, Istimrardars, or tenants at a fixed rent, holding their tenures from Zemindars or other superior landholders, who had already held their land at a fixed rent for more than 12 years, were declared liable not to be assessed with any increase, either by the officers of Government, or by the Zemindar, or other actual proprietor of land: while on the other hand, in the case of Bhobinder Narain, *versus* Bishonauth Rai†, judgment was given in favour of the Zemindar, it appearing that additions had been made to the assessment of the Taluk within the period of

* Reports of Sudder Dewanny Adawlut, vol. i. p. 303, 4.

† Sudder Dewanny Adawlut Reports, vol. i. p. 100.

12 years prior to the decennial settlement, and no mention being made of a Mokurreree tenure on the part of the Talukdar in any authentic document;—and generally, I may observe, that the *equitable practice of our courts* is to prevent an undue increase of rent in all cases of long-continued Talukdarry tenures resting on prescriptive right, and corroborated by a descending line of respectable proofs.

2ndly. A second class of Talukdars rest their claims to a permanent Jumma upon special engagements entirely, as those denominated Putnee, and which is described in the Preamble to Regulation VIII. of 1819, a Taluk created by the Zemindar to be held at a rent fixed in perpetuity, by the lessee and his heirs, but which may be brought to sale for arrears of revenue, without the intervention of a regular decree.

3rdly. But the rent of the Be-caimi or Be-Istimrari Talukdar or middle man, is liable to be enhanced, and his tenure determined, according to the nature of the engagements under which he holds: Pottas granted to Jungulboori Talukdars, in consideration of the grantee clearing away the jungle and bringing the land into a productive state, give it to him and his heirs in perpetuity, exempting him from payment of the revenue for a certain term, and at the expiration of it subjecting him to a specific asal-

jumma, with all increases, Abwabs, and Mahtoots imposed in the pergunnah generally, and this in proportion to the quantity of land brought into cultivation; and the grantee is further subjected to the payment of a certain specified portion of all Nuzzerana which he may receive from his under-tenants exclusive of the fixed revenue*. In the case of Khaja Arratoon and Massammat Karim-oo Nissa, *versus* Doorga Persaud, Bhuttacharjya, and others†, it was held that the assessment imposed at the time of the decennial settlement on a Taluk held under a Jungulboori tenure, is liable to be enhanced according to the pergunnah rates, on a measurement of the lands brought into cultivation. But although the rent is liable to be enhanced, yet Jungulboori tenures are not generally resumable, unless under a specific agreement to that effect‡.

Mourusi Ijaradars do not possess by the specific terms of their lease more than an hereditary right of occupancy. If it be not Istimrari or entitling the tenant to hold at a fixed rent, the amount is variable, and when not settled by mutual agreement, is determinable only by the indefinite standard of the customary rate of the pergunnah§.

* See Section 8, Regulation VIII. of 1793.

† Sudder Dewanny Adawlut Reports, vol. iii. p. 36.

‡ Sudder Dewanny Adawlut Reports, vol. ii. p. 49.

§ Note to p. 140, vol. i. Sudder Dewanny Adawlut Reports.

The continuance of the tenures of farmers will depend upon the duration and terms of their lease, and upon their compliance with the conditions of it.—If, says Section 15, Regulation VII. of 1799, the defaulter be an under-farmer for the past year only, or whose lease may have expired with the past year, he can of course have no claim to any further lease; and although his lease may not have expired, if he shall have neglected to fulfil the conditions of it by the payment of his stipulated rent, it must be considered liable to be annulled or otherwise at the option of the lessor. And if the defaulter be a lease-holder or other tenant, having a right of occupancy only so long as a certain rent or a rent determinable on certain principles, according to local rates and usages, be paid, without any right or property or transferable possession, the proprietor of whom such tenure is held, or the farmer or other person, to whom such proprietor may have leased or committed his rights, must be understood to have the right of ousting the defaulting tenant from the tenures he has forfeited by a breach of the conditions of it. Of the remaining middle men, Ihtimamdars, properly so called, Tehsildars and Gomashtas of all descriptions, and mostly all Talukdars of recent creation hold under be-Istimrari tenures, the rent payable by them being liable to be enhanced or their tenures to be determined at the will of their superior lord or master.

I may mention as applicable to the subject, that by Section 18, Regulation VIII. of 1819, the tenures of all persons holding *intermediately* between the Sudder Malguzar and the actual cultivators, may on the institution of a suit for arrears of rent, whether the alleged defaulter has *been arrested or not*, be attached*, and after an arrear has been adjudged due by a summary suit, any lease farm or other *limited interest intermediate*, may be *cancelled by* the Sudder Malguzar. But no *summary award* for arrears shall subject *real property to sale excepting Putnee Taluks.* Such real property shall be subject to sale *only on obtaining a decree in a regular suit.*

2ndly. And secondly, of the tenures below the Talukdars and middle men, which are denominated ryuts—now these are,

1*st.* Either Cadeemee or Khoodkashto, or permanent and hereditary occupants, not liable to an increased assessment, nor under Section 18, of the Regulation last quoted, shall their tenures be attached or cancelled for arrears. Such arrears shall be recoverable by process of arrest, distraint, or summary suit; but should the arrear be adjudged due at the end

* Provided the arrear shall have been due for one entire month previous to the date of attachment, and shall not be less in amount, than the entire kist of the month on account of which the arrear may be claimed.

of the year and not be paid, they may be otherwise disposed of, by the authority of the court, to the exclusion of the defaulter.

2ndly. Individuals, generally denominated *Paikashto*, frequently holding on short leases, liable to enhanced rents, with reference to the nature of the land and of the engagements subsisting, and in some cases to be annually ejected.

But it must at the same time be confessed, that the foregoing is by no means a satisfactory account of the various Talukdarry and ryutty tenures at present existing; like the superior tenure, as described under the II. Head of action, the right of property and collection is in the same manner blended in those which we have just been considering, particularly amongst Talukdars, presenting a host of variations which it would require more time and ability than I possess, properly to develope. I find that that great authority, Mr. Colebrooke*, considered the origin and nature, and the descriptions of dependent Taluks at present existing, to be involved in considerable obscurity; few, according to that gentleman, have been able to preserve the benefit of a quit-rent fixed in perpetuity, almost all by abuse have become liable to a variable assessment; some would appear to be the

* Remarks on the Husbandry and Internal Commerce of Bengal, 1806—Cap. IV.

Zemindarry tenure subdivided—others, no better than permanent leases of lands held in farm.

Now Jummabundees entered into between the Sudder Malguzar and his under-tenantry are contested on such grounds as the following :—That the plaintiff did not execute the deed, *non fecit*—that he holds no lands of defendant : now should it appear that the plaintiff is the former Talukdar, or perhaps a relation of his, and does or did hold land of defendant, the presumption will be strong in favour of the correctness of the document in question—on the other hand it is *possible* that the plaintiff may be able to prove satisfactorily that he has not the slightest connection with defendant, in which case the presumption will have a contrary tendency. But the more general ground of contention is this, that the amount of the assessment is excessive—an issue determinable by the condition of the litigating parties, by what the under-tenant has formerly paid, by what the Sudder Malguzar has formerly received, by the right of the former to a Caimi or permanent Jumma, by the right of the latter to enhance : and whereas it will be observable from a perusal of the foregoing remarks, in what instances the rents of the inferior tenures are liable to be enhanced by Sudder Malguzars in their *general* capacity, it will be sufficient that I remark,

III. In the third and last place on the power to enhance rents and annul existing engagements with which they have been armed by the law in their *special* character of purchasers at public sales.

These individuals, as I have elsewhere taken occasion to observe, being entitled to receive the estate as nearly as possible in the condition in which it was at the period of the Dahsalah Bundobust, it is declared by Section 30, Regulation XI. of 1822, that all tenures which may have originated with the defaulter may be annulled by the purchaser, saving *bonâfide* leases of ground for the erection of houses or for gardens, or the like, which shall continue in force so long as the land is appropriated to such purposes and the rent duly paid.

1*st*. Now, should no engagements have been subsequently entered into by the under-tenant, (which if not contested, or proved, will of course determine the rent payable,) Section 6, Regulation V. of 1812, provides, that purchasers at public sales shall collect according to the pergunnah rates where such exist, "a term," says Mr. Smyth, in his work before referred to*, "so very indefinite, and where the respective interests of the parties concerned are so very different, so likely to create dispute, that it is a subject of regret that at the time of the formation of the perpe-

* Smyth's Zemindarry Accounts, p. 160.

tual settlement no attempt was made to define more accurately the relative rights of the Zemindar and ryut, and no stronger barrier erected to afford protection to the tenantry of Bengal."

2ndly. Where no pergunnah rates exist, adjacent rates—where no adjacent rates can be conveniently obtained, at a rate not exceeding the highest rate paid for the same land, within the period of the three last years antecedent (Section 7); a rate, I may observe, seldom called into practice, and justly animadverted upon by the author of the Further Inquiry, in his chapter on the landed revenues and land-tax of India*.

3rdly. Rents for the year ensuing may be enhanced either under written engagements, as noticed in my first head, or by serving on the cultivator a notice at the season of cultivation with the grounds of enhancement, (see Section 9, Regulation V. of 1812,) in which case should the person upon whom the notice is served conceive himself, under the Regulations in force and the usage of the country, not liable to an enhanced demand, he is at liberty to contest the same, either by summary suit, that is to say, by refusing to pay the rent on distraint and entering a plaint under the Regulation last quoted, or by regular suit in the Dewanny Adawlut;—and the right of the Khoodkashto ryut, it will be unnecessary to repeat, will stand

* Page 137, et seq.

good against auction purchasers, under Sections 32 and 33, Regulation XI. of 1822, unless where the lands may be holden by especial favour at a lower rate of rent than is justly demandable—or unless the contrary be decided by a regular suit in a court of justice; and I think I may take the liberty of laying down, that protection against an enhanced rent should likewise be afforded to Istimrari Talukdars or middle men, in some especial cases as above noticed*.

HEAD V.

V. A fifth species of action of common occurrence in the Zillah courts is brought to rescind a cabouliet, which is an agreement given in exchange for a Potta or lease. I will first take the same distinction as I did in the preceding head, dividing cabouliets in like manner into 1st, Sudderi or Huzzoori, being those given to the state, and 2ndly, Shikmee, being those given to the head Malguzar. I will then observe on the different kinds of cabouliets, on the incidents required by the regulations to accompany them, and lastly, on the grounds of action usually advanced for their rescission: and

I. Of Sudderi or Huzzoori cabouliets; and these may be either for lands perpetually assessed, or for

* I should imagine that the rents of Putnee Talukdars, though those tenures originate with the defaulter or his predecessors, should not by their nature be enhanceable by auction purchasers.

lands liable to a variable impost. As regards the first, it is engaged on the part of the Zemindars to liquidate the Government dues by stated instalments, to assist in the apprehension of offenders and uphold the police, to keep the roads and bridges in repair in their respective Zemindarries, and moreover to furnish supplies on being paid for the same (which payment I am bound to say is frequently omitted), to bodies of troops on their march, the rules relating to which matter are laid down as regards landholders, farmers, Tehsildars, or other persons in charge of lands, by Regulation XI. of 1806. On landholders or Zemindars—it is incumbent so to do in conformity with the terms upon which the permanent settlement was granted. On farmers or Izarahdars, I allude to Sudder farmers—it is incumbent, because they are pro tempore in possession of the Sudder Malguzary right. On Tehsildars and others it is incumbent, because they are either the mere servants and agents of the Sudder Malguzar, or they are Tehsildars kham or khas, appointed by the state to make the collections, and the state will thus be in the place of the Zemindar. It has moreover been provided by Regulation VI. of 1825, that the revenue authorities, in whom the preparation of supplies is vested, may fine landholders and others neglecting or refusing to provide them to the amount of 1,000 sicca rupees. In the enactment first mentioned, the state was careful to enact precise rules

in order to secure the due payment of whatever might be supplied, and the revenue officers were directed to depute a respectable native officer to accompany each detachment. In order to prevent disputes between landholders, as to the quantum of supplies which each should afford, it is advisable to prepare a schedule, exhibiting the amount of the revenue of each Zemindar through whose property detachments are in the habit of passing, and to call upon them to furnish supplies in quantity corresponding with such amount. Sudder Malguzars, generally speaking, indemnify themselves for all expenses incurred on this head by a clause in the engagements made by them with their under-tenants.—As regards the second or Sudderi cubouliets, given for land subject to a variable assessment, they differ from the first principally, in the period of the kists, and in the reservations, which the Government will make for an after increase of assessment, and in other particulars specially applicable to the case.

2nd. Of Shikmee cabouliets, given to the head Malguzar, either by the Talukdar to the Zemindar, or by the ryut to the Zemindar. Talukdarry cabouliets, though differing in each particular case, generally mention a specific sum in money as rent, and often include a specified sum for Nazzerana on certain festivals, marriages, and the like. Provision is likewise made in them for the supply of coolies and

a bazar for passing detachments, and for keeping the roads and bridges in repair. Ryutty caboulicts are either direct to the Zemindar, or intermediate to a middle man or Talukdar. But the cadeemee ryut can seldom produce his lease, the counterpart of his caboulict. Caboulicts are now frequent amongst recent creations, generally Talukdars, appointed by the Sudder Malguzar on payment of a certain Bhaint or Nazzerana.

I. *First.* With respect to the different kinds of Shikmee caboulicts.

1*st.* Caboulicts may be in money, where the rent agreed upon is specifically stated.

2*ndly.* Caboulicts may be in kind, where the tenant agrees to deliver a share of the produce as rent, and these are generally termed *Bhagi.*

3*rdly.* Caboulicts may be jointly in money and in kind.

4*thly.* Caboulicts may be of Julkur, where the right of fishing in an estate perpetually settled is conceded; or,

5*thly.* Of Phulkur—the same as regards fruit. The payment in both cases last mentioned, may be either in money or in kind.

6thly. Cabouliets may be of Salt, in districts where a salt revenue is paid to the agent*.

II. With regard to the incidents which are required by regulation to accompany cabouliets and Pottas:—and,

1*st*. In reference to the period for which proprietors are competent to grant them.

By Section 2, Regulation V. of 1812†, it is enacted that proprietors of land are competent to grant leases for any period even to perpetuity, and at any rent which they may deem conducive to their interests and most convenient to themselves and their tenants, provided that this rule shall not be construed to empower persons holding a restricted interest in estates, whether for life or for other limited period, or subject to controul or restriction in the use or disposal of the property, to grant leases extending beyond the term of their own interest in the property, or exceeding their power or authority over it.

2ndly. In reference to their form and substance.

* To these may be added, 7thly, Ghasskur; 8thly, Bunkur.

† By this regulation, Section 2, Regulation XLIV. of 1793, by which proprietors of land were precluded from granting leases for a period exceeding 10 years, is very properly rescinded.

By Section 3, Regulation V. of 1812, it is declared, that such parts of Regulations VIII. of 1793 and IV. of 1794, as require that the proprietors of lands shall prepare forms of Pottas, and that such forms shall be revised by the collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are hereby rescinded; and proprietors of land shall henceforward be considered competent to grant leases to their dependent Talukdars, underfarmers, and ryuts, and to receive caboulicts fr each of those classes or any other classes of tenants according to such form as the contracting parties may deem most convenient, and most conducive to their respective interests:—provided however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of abwab, mathote, or any other denomination; all stipulations or reservations of that nature shall be adjudged by the courts to be null and void; but the courts shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them. That is to say, as I take it, if the cess be definite and specific, it is the duty of the court to uphold it. Caboulicts often run thus: ten rupees

revenue, two rupees salami, and two rupees for supplies of troops: now it appears to me that such should be upheld by the courts, inasmuch as the sums have been specifically agreed upon between the parties. It is also frequently the custom, after the manner of the feodal ancestors of the ruling power, to insert some specific sign or memorial of service, as to render at certain festivals a fowl or a kid, such caboulicts partaking of the mixed character to which we have before taken occasion to allude.

3rdly. Thirdly, and lastly, of the grounds of action usually advanced for the rescission of Shikmee caboulicts; and,

1*st. Where a third person is concerned.* In conformity with the practice of our native lawyers, the cabouliet sub lite is generally alleged to have been obtained by force: Ram Das the under-tenant holds no land of Ram Persad, nevertheless said Ram Persad, on the 1st Falgoon, having placed three Peadahs over him, and having dragged him to his Zemindarry office, did forcibly take a cabouliet from him for two bigahs of land at a yearly revenue of five rupees, which said cabouliet forcibly taken as above laid, he, Ram Das prays, may be rescinded. Ram Persad denies the force, affirms that Ram Das is a ryut of his in possession of two bigahs of land, that he granted the cabouliet willingly, in presence of witnesses,—and so

he will prove: now the force is affirmed on the one hand and denied on the other, and thus an issue is obtained; but independently of its being more nearly suited to magisterial investigation, that is not the safest issue to try; though we may be accused of what in legal phrase is termed a "departure." The truth is, there is generally a third party concerned, who sometimes voluntarily appears on the proceedings, (where he does not, I would advise an Ihlam Namah to be issued to him, with a view to making him a party to the suit;) for though Ram Das the plaintiff affirms that he holds no land of Ram Persad, yet he holds the *land in question*, but gives revenue for it, to this third person, whom we will denominate Ram Tunoo; and Ram Tunoo, on appearance, will justify his taking from Ram Das. A second issue will therefore arise —Do the two bigahs belong to Ram Persad or to Ram Tunoo? Now if the land is proved to belong to Ram Persad, the caboulict will not be rescinded, and *mutatis mutandis*. I would be understood to mean, that the issue of force merely, under which sundry other circumstances lie always concealed, is not sufficient for an ascertainment of the merits of the case. B took a caboulict from A, for the Julkur of a certain nullah, stating it to be comprised in his Zemindarry; A brings his action, states the caboulict to have been forcibly taken from him, and that he has invariably rented the nullah from a third person, C; C appears and justifies, and the right to the nullah ap-

pears to be in him, and thus the caboulict is decided to have been forcibly taken and rescinded accordingly.

2ndly. Secondly, where there is no *third party concerned*, the decision of the case is comparatively easy. If Ram Das does not possess Ram Persad's land, whose land does he possess? His possession can surely be ascertained; and if he sets out with denying it in his plaint, or if it should appear that he has formerly held land of Ram Persad, or that although no land appear in his name in the Zemindarry documents, yet a Talukdarry or ryutty tenure stands in the name of his ancestors or relatives; in such cases the presumption will be strong in favour of present possession and of the document having been voluntarily granted.

3rdly. A third plea advanced for rescission, is that the sum stated in the caboulict is excessive, and more than complainant is bound to pay, which will be determined by the circumstances of the case or by the right to enhance*.

4thly. And a fourth ground is when the holder of a caboulict has been dispossessed, either by his own

* See this matter discussed above under the head of Jummabundees, pp. 113 to 124.

parcener or by another proprietor, of the whole or a portion of the land included in the caboulIet; but the granter of it nevertheless continues to sue him, probably by summary suit under Regulations VII. of 1799, or V. of 1812, (in which I am bound to say, many of the actions under this and the succeeding head are originated,) and the dispossession being proved without laches on the part of the plaintiff, he will be entitled to a verdict; and the same, where the tenant, which generally happens to those ryuts denominated Paikashto, or holding on Bhagi leases, has tendered his resignation to the Sudder proprietor, though he will still be answerable for the revenue of the current year.

Head VI.

VI. A sixth action relating to matters of revenue, and partaking in its nature somewhat of that which we have been last considering, is an action for Takrar Khazanah: and this is brought by the under-tenant for his protection; revenue having been taken from him by two different individuals, who are made to appear as defendants: accordingly it is the duty of the court to ascertain whose right is the strongest, and to direct such individual to receive the rent until a better right be proved. These suits are frequently the offspring of summary investigations for rent, particularly those instituted under Regulation V. of

1812, for, his property having been distrained by two individuals, the tenant flies for refuge to a regular suit in the Dewanny Adawlut. And I may here remark, that in the course of those summary proceedings when the right to take revenue does not clearly appear to be either in A or in B, it is advisable to order the tenant C to enter his revenue into court, referring A and B to a regular suit for the land. Now C, the tenant, states in his plaint that A and B have both taken rent from him for the year 1237, Bengal Æra, that he paid it to A in the usual course, and that B has levied it by distraint, perhaps with the assistance of a summary decree. Plaintiff accordingly prays for the interposition of the court, that either A or B may be enjoined from taking rent from him : he moreover usually confesses to the right of one of the parties, and states his damages at the amount of the revenue so illegally taken, with the costs which have been given in the summary decree, should such have preceded. For it is observable, that this species of action frequently takes the form of an action to reverse the summary decision passed by judges, their registers, or by collectors, because those decisions are not appealable *per se*, but only through the medium of a regular suit. A and B the defendants, will appear and file their replies; A to the effect that he has always received rent from C, as indeed is admitted by him, and that he realized it as usual in the year in question. B will claim on a

caboulict recently granted; on a Nilami Chitta—as a mortgagee or as a farmer for a term of years: now the matter for trial will not be so much between C and A and B, as between the two takers of rent A and B, for the right to take rent being denied on the one hand and affirmed on the other, the issue will be to be tried as it were between A and B; the tenant C, although the plantiff, being merely, if I may use the expression, a spectator of the legal conflict. Who then has the strongest right to take rent from C, or in other words, is the proprietary right in the land vested in A or in B? an issue determinable by multifarious considerations—and I may add that these suits are not infrequently decided by the Istimrari right of one of the parties, for supposing that the right of B to the land be not clearly proved, and it appear that A has received rent from C for the last twenty years, the taking should be continued in A, leaving B to prefer any further claim in the court; or should the right be apparent in neither A or B, nor ascertainable without recourse being had to a subsidiary regular suit, it is advisable, in the manner to which I have above adverted, to direct the tenant to enter *ad interim*, the litigated sum into court, until the right of either party be legally established.

Head VII.

VII. The action to obtain a Dakhilah, which I shall shortly consider under this seventh head, is founded upon the 63*rd* Section of Regulation VIII. of 1793, whereby it is enacted, that every proprietor of land and their agents of every description receiving rents from dependent Talukdars, under-farmers, ryuts, and others, are to give receipts for all sums received by them, and a receipt in full on the complete discharge of every obligation; and any person to whom a receipt may be refused shall be entitled to damages from the person who received his rent and refused a receipt, equal to double the amount paid by him.

Now *the simple issue* in causes of this kind is, when the payment of the rent, say ten rupees, is affirmed on the one hand and denied on the other, and it will remain for the court to take evidence as to the payment, which from the nature of the case, will consist chiefly of evidence by parole*.

The *more complicated issue* is, when it is pleaded on the part of the defendant that he has received the

* A receipt for rent due on a particular day raises presumption that the prior rents have been paid to that period; yet the contrary may be shown: but if it be a receipt in full for all demands, under hand and seal, the presumption is so strong that the law admits of no evidence to the contrary.—Garde's Law of Evidence, pp. 25, 26.

rent in question, but that he refused to give a receipt in full for it on the ground that he is entitled to more, say fifteen rupees, in which case it will be to be determined whether the rental of plaintiff is ten rupees or fifteen, and thus the issue is shifted to a question of considerable magnitude and intricacy: should it appear on the part of the defendant that the plaintiff has paid eleven rupees, it is strong evidence that he ought to pay fifteen, or rather, that his rental is not ten—unless indeed, said plaintiff did set forth in his plaint and bring evidence to prove, that eleven rupees were forcibly taken from him by defendant—and it has been held, that Zemindars are justified in withholding receipts for rent paid by Talukdars who demand them as if for a fixed rent, and who cannot prove their title to hold by an Istimrari tenure*. Or the defendant may plead as reason for refusing a receipt, that the plaintiff lays claim to a higher degree of tenure than he is entitled to by law or by prescription, as in the case of Hernarain Chowdry and others, *versus* Kowla Kant Gosain and others†: in that case the plaintiffs sued as Talukdars, while the defendant only admitted them to be Ijarahdars; and although the judge held that clause 1, Section 63, Regulation VIII. of 1793, —the cause of the refusal to grant receipts being a dispute concerning the tenure,—was irrelevant to

* Sudder Dewanny Adawlut Reports, vol. i. p. 304.

† Sudder Dewanny Adawlut Reports, vol. ii. pp. 221, 222.

the case, yet he passed an order that the right of the plaintiffs to obtain receipts as Talukdars was proved, and that the Sudder Malguzar should grant them receipts as such. It is sufficient that the rent has been received by the agent of the defendant duly authorized.

HEAD VIII.

VIII. Eightly, of actions for the return of a valuable consideration given for land or its profits—in treating of which I will state the general substance of the common law of contracts as given by Mr. Macnaghten, and then expose simply the circumstances under which action of the kind may be had.

"The principles of the Hindu Law," observes the Gentleman above-mentioned, "relative to contracts, are founded on the basis of good sense and equity: the same incapacitating circumstances which are the means of avoiding contracts according to other systems have been specified by the Hindu priests; thus insanity, minority, coverture, lesion, error, force, fraud, incompetency, incapacity, and revocation are each the cause of effecting the dissolution of obligations; to these must be added, degradation, entry into a religious order, and any predicament that operates as a civil death." The Mahommedan law is more specific as regard contracts; the requisites generally for them

and for sale are particularized by Mr. Macnaghten. "He defines sale to be a mutual and voluntary exchange of property for property; he divides sales into four kinds, commutation of goods for goods, of money for money, of money for goods, and of goods for money. When the property sold differs either with respect to quantity or quality from that the seller had described it, the purchaser is at liberty to recede from the contract; if beneficial use has been had, the purchaser will be entitled not to the whole price given, but to the price after deducting such beneficial use. It is sufficient that the parties have a sense of the obligation they contract, and a minor with the consent of his guardian or a lunatic in his lucid intervals may be contracting parties."

Actions for the return of a valuable consideration given for land or its profits, can be had

1*st*. First, when, to use the words of the Mahommedan Law, the property sold differs either with respect to quality or quantity from what the seller had described it*. Seyud sells to Omar, eight bigahs of land,

* The option possessed by purchasers at public sales to relinquish their purchases on the discovery of any material error in the description of the lands sold to them, was noticed in the case of Doorgapershad Bhose, *versus* collector of 24-Pergunnahs, August 18th, 1806. But this is the first instance in which the right in question, founded upon an obvious principle of equity

describing the produce thereof to be at the rate of four rupees the bigah. On investigation it turns out that the land will not lease at more than two rupees the bigah, and that Seyud had never let it at a larger revenue. Omar will recover from Seyud the money paid for the said eight bigahs, less the beneficial use of the property, calculated at the true amount at which it will let for the period during which Omar held *bonâ fide* possession. Again, Seyud describes in the bill of sale the land to be rent-free or lakheraj: at the end of one year Omar is dispossessed by a third party who affirms it to be kheraj, and part and parcel of his Zemindarry, most probably a Sudder Malguzar recently come into possession, resuming all the grants of his predecessors, and all alienations made by them by way of Khouroposh and Nankar—or perhaps claiming on a Nilami Chitta. Omar on a conviction of the justness of the claim, relinquishes possession, and sues Seyud for the return of the valuable consideration: and supposing the circumstances to be proved, as stated above, he will no doubt be entitled to recover; but it is proper, at the same time, that Omar should certify his intention of abandonment to Seyud, in order that said Seyud may take measures to secure his rights, should he deem it expedient to enter into a civil contest for

and the law of contracts, was judicially declared by the court. Note to page 177, vol. i. Sudder Dewanny Adawlut Reports—case of collector of Dinajpore, *versus* Goorchand Sarma.

the property in dispute, and that Omar, in order to entitle him to the remedy of which we are speaking, should avoid collusion with the dispossessing Zemindar.

2. *Secondly.* On failure to give possession—such having been previously agreed upon as a condition of the contract.

Now in cases of private transfers of land possession may be given—

By causing an interchange of pottahs and caboulicts, than which a completer method of giving seisin cannot exist.

By means of an Amaldari Chitti—which is a letter of authority to the purchaser, admitting his proprietory right, and calling upon the tenantry to obey it, and to enter into engagements with him. But in all cases of private transfer, as contradistinguished from sale by public auction, possession is given and obtained with comparative ease, unaccompanied by that difficulty and litigation which, I regret to say, are inseparable from sales for arrears of revenue.

In his precedents of Hindu Law, Mr. Macnaghten cites the following case*:—A landed proprietor sold

* Hindu Law, vol. ii. p. 303, and Note.

his estate to the plaintiff's father—but when the contract was made, the estate was under mortgage, on which account the seller was unable to deliver the property sold into the purchaser's possession. Five years after this transaction, the vendor sold the same estate to a third party, the defendant, and having redeemed the mortgage with the purchase-money delivered it to the defendant, the second vendee, who is still in possession—in this case will the property in question revert to the first purchaser, or will it remain with the second? The reply was, that if a person having sold his lands to one individual again sell the same property to another, the first purchaser is entitled to the property. *In all other contested matters*, adds Mr. Macnaghten, *the latest act shall prevail; but in case of a pledge, a gift, or a sale, the prior contract shall have the greatest force.*

A sale of mortgaged property is thus *valid*, and becomes *complete* on *discharging the imcumbrance.*

It is of course optional with individuals with whom contracts of sale have been concluded, to sue either for possession of the land itself, or for the return of the valuable consideration given for it. In the case above-cited, the plaintiff had, I apprehend, the like option—he sued however for the land, and obtained a decree—it would thus remain for the second vendee or defendant to recover his purchase-money from the vendor.

3. *And thirdly.* Actions for the return of a valuable consideration are frequently brought by farmers for a term of years, or by mortgagees when their possession and usufruct has been determined, by the sale of the Sudder Malguzarry right of the giver in farm or mortgagor—in which case too, may arise a question of account, as noticed in Head IV. of my first chapter—Or by the private transfer of the land itself. In cases of *usufructuary mortgages*, the mortgagee may either relinquish possession, and sue the mortgagor for the return of the valuable consideration, or for an adjustment; or he may, should he prefer to adopt such course, legally retain possession. —It is declared by the Hindu Law, that the sale of mortgaged property, without the discharge of the incumbrance, or without *some arrangement* being made for its discharge, is illegal and incomplete, and the mortgagee is competent to retain possession until the debt be satisfied*; and by the Mahommedan law, the absolute sale of land conditionally sold, that is, by deed of Bye-bil Waffa, is valid, but its operation and completion are *suspended on the pleasure of the two purchasers*†.

In *reference to farmers for a term of years*, I may instance one case‡, wherein a Mussulman dis-

* Hindu Law, vol. ii. pp. 307-8.

† Mahommedan Law, p. 176.

‡ Mahommedan Law, p. 175.

posed of a landed estate to his wife, by a deed called a Beea Mokasa, which estate had been previously farmed by the proprietor to a stranger for the term of six years, the proprietor receiving an advance of rent amounting to 4501 rupees, in which it was held, that the estate passed and was conveyed in virtue of the deed, and that the wife or purchaser thus became proprietor, though she had not got possession under the Beea Mokasa. The Meiadee Ijarahdar partakes in its nature so nearly to a mortgage, that I should conceive that the Ijarahdar cannot be legally ejected without adjustment and liquidation; should such occur, however, he will have this remedy in an action for the return of the valuable consideration.

HEAD IX.

IX. I may mention, ninthly and lastly, the suit regarding alluvion and dereliction, Deriah Shikastagi and Paiwastagi; and as the legislature has *in this instance* found it expedient to lay down fixed rules for determining actions of the kind, it will be sufficient that I recount those rules, which are comprised in Regulation XI. of 1825, and which, by the way, are almost entirely based upon former decisions of the Sudder Dewanny Court.

By the English Law, as laid down by the learned commentator, Blackstone*, an immediate owner is from motives of policy given in these cases; whereas, according to the laws of other nations, a title is acquired by occupancy. Where land is gained from the sea by alluvion or dereliction, the law is, that if the gain be paulatim, it goes to the owner of the soil; if suddenly and considerably, to the king. Bracton tells us, " that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore, which is agreeable to and probably copied from the civil law. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as usually is whenever a several fishery is claimed, then it seems just, and so is the constant practice, that the eyotts or little islands, arising in any part of the river, shall be the property of him, who owneth the piscarry and the soil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant, yet ours gives it to the king."

* Volume ii. p. 261.

Regulation XI. of 1825, which follows in certain points the English and Roman laws*, enacts, that claims of this description shall be decided by immemorial usage, when such can be clearly rocognized and established; should no such usage be in existence, in cases of gradual accession, the land shall be considered an increment to the tenure of the person, to whose land or estate it is thus annexed, of whatsoever kind the estate of the person may be. But the person, whether a Zemindar or ryut, or any other description of under-tenant, shall not be exempted from any increase of assessment or rent. When a river by a sudden change of its course may break through or intersect an estate, the lands so separated, being clearly recognised, shall belong to the original owner: churs or islands thrown up *de novo*, shall be at the disposal of the ruling power, if the channel to them from the main land shall not be fordable; but if fordable at any time of the year (at low water I presume), they shall be deemed increments in the manner above stated—and in small and shallow rivers, the beds of which, with the Julkur right of fishery, may have heretofore been recognised as the property of individuals, any chur thrown up shall belong to such

* See further Blackstone, p. 262, regarding sudden and violent changes of the courses of rivers, &c. &c.—and Code Napoleon, p. 154; and Note to vol. ii. Harrington's Analysis, p. 251.

persons, subject to the foregoing rules regarding assessment—For all land, as a general principle, belongs to the state; either it is included in perpetually settled estates, in other words, has been assessed —or the right to hold it rent-free under a good and valid title has been affirmed by the ruling power—or it is assessable under the Regulations in force—Assessable, either as being improperly held free from revenue, or as having been reclaimed from the waste, or gained by alluvion or dereliction.

PRELIMINARY REMARKS TO CHAPTER III.

SUBSTANCE of the Chapter, namely, the discussion of those summary and miscellaneous proceedings having reference to the regular actions treated of in Chapters I and II, to which is added the suit under Regulation XV. of 1824.

Of costs and execution.—*Of costs*—general principles for their distribution not usually granted by our courts in miscellaneous matters unconnected with suits regular or summary—costs may be 1*st*, entire to either party; 2*ndly*, each party may have to pay his own costs; 3*rdly*, a distribution may be made in proportion to the claim established. *Of execution*—and

1*st*. Of execution in special cases.

2*ndly*. Of how execution may be stayed or enforced.

3*rdly*. Of how execution is influenced by the nature of the property or right to be delivered in execution or sold in satisfaction.

4*thly*. Of how the person is affected in default of property wherewith to satisfy the decree.

Grounds of objection to execution in one or two especial cases noticed—and concluding remarks.

IT is my intention, God willing, in this my third and last chapter, shortly to treat of those miscellaneous petitions and suits conducted under summary

process ; but having reference principally to the regular actions which have formed the subject of the two preceding parts ; into which collection I intend with the readers' permission to admit a suit belonging by Regulation to the office of the magistrate, but nearly approaching in its nature and in the process used in conducting it to a civil action. I allude to that summary suit for dispossession, instituted under the provisions of Regulation XV. of 1824.

Those miscellaneous petitions, which are not separately noticed, relate chiefly to *costs* and *execution*, regarding which it will be proper that I submit a few observations in this place; and,

1*st*. *Of costs*. It is said that " there are two general principles, on which courts of equity usually act in giving or withholding costs, namely, the remuneration of the successful and the punishment of the unsuccessful party; in some instances remuneration appears to be the sole or at least the leading principle, whilst in many instances both remuneration and punishment may be considered to be the combined or joint principle, it being in these latter instances difficult to ascertain, which of them is the leading or preponderating principle, neither of them being more prominent than the other†."

* Beames' Doctrine of Costs.

Costs then are determined by the success of the contending parties, and apportioned according to the quantum of justice brought by each litigant into action. But with us, unlike the English courts of equity, an order for costs is not made upon each separate motion, but they are apportioned to either party on the termination of the suit, without reference to the failure or success of any particular petition. Thus A has instituted a suit for two bigahs of land, during its progress he prays for an injunction, forbidding B to dig a tank thereon; now whether the injunction be granted or not, no order for costs is made upon that particular question, it is placed with the other papers to abide the fate of the whole action. I may also observe, that in miscellaneous matters unconnected with regular summary suits, it is not usual, to make any direction at all regarding costs: indeed, by reason of the multiplicity of petitions, of the diversity of the tribunals to which they are presented, of the extended machinery of the system, it would be no easy matter to collect them, so that the wrong party should be punished and the right remunerated. From the custom of heaping petition upon petition, it would appear to me that my countrymen relied more upon their number than on the matter contained in them, conceiving that by keeping up a continued fire, one fortunate bullet may at last succeed in hitting the notice and recollection of the Sahib.

Now in regular suits between party and party, or in regular summary suits, costs may be,

1*st*. *First, entire to the one party or the other*—that is, either party obtains his costs. Either the suit is decreed with costs, or is dismissed with costs: in the first case the plaintiff will obtain his whole costs from the defendant; in the second, the defendant will obtain his whole costs from the plaintiff: this may happen in nonsuit, as well as on the merits.

2*ndly*. *Secondly, each party may have to pay his own costs*: this is, where a perfect right is not inherent in either party; neither is the plaintiff so right, that he should obtain his whole costs, nor is the defendant so wrong, that he should be saddled with the whole costs; or perhaps the parties may have made some act of omission or commission, which renders such a distribution accordant with justice; and costs may be apportioned in this manner, notwithstanding that the principal claim be decreed or dismissed:—And,

3*rdly*, A third and very fair and appropriate method of distributing these *damna actionis* is, *in proportion to the claim established* by the plaintiff: thus A sues B for 1,000 rupees; after inspecting the proofs of the parties, and perhaps admitting a set off in part claim, the judge decides B to be indebted to A,

in the sum of 500 rupees. Now A will not obtain his whole costs from B, but only in proportion to the amount proved. Thus the stamp of the paper of plaint will be calculated as one for 500 rupees, the Vakeel's fees in the same manner, and so on.

It remains to state that costs are totally influenced by the decisions of the superior courts, unless specifically stated to the contrary: that the judge has discretionary power to release any one of the defendants from costs* amongst other consequences of the suit, a discretion frequently very properly exercised, where *collectors have been made defendants :* and lastly, that costs are secured to the victorious party by the general rules of execution.

2ndly. Secondly, and finally, of execution, which is the life of law and the object of all judicial proceedings, and "by which the party entitled to a benefit by decree of court is conducted to that benefit† ;" in discussing which, as shortly as I am able, I shall treat,

1*st.* Of execution in special cases.

2ndly. Of how execution may be stayed or enforced.

* Costs must be awarded whenever it is so directed by the regulations—unless indeed, in consequence of some act of omission or commission, the party may not deserve them.

† Bingham's Law of Judgments and Executions.

3rdly. Of how execution is influenced by the nature of the right or property to be delivered in execution or sold in satisfaction.

4thly. How the person is affected in default of property wherewith to satisfy the decree.

I. *Of execution in special cases*, and,

1*st*. Where Government is a party to the suit. By Sections 2 and 3, Regulation VIII. of 1806, the court wherein an action against Government was first instituted was in the habit of transmitting the plaint to the Governor General in Council, who after making such inquiry as he deemed proper through the channel of the respective offices, determined whether the redress solicited should be granted by Government, or whether the complainant should be left to seek his remedy in the regular course of law, and in the latter case whether the suit should be defended on the part of Government as a public action, or by the person affected by the complaint in his individual capacity. But as considerable inconvenience was experienced from the delay incident in that mode of proceeding, the duties above-mentioned, were assigned by Section 3, Regulation II. of 1814, to the different Boards, and latterly by order in council to the local commissioners. It has of late become the fashion to threaten public officers, especially col-

lectors, with being made personally answerable for the result of these actions. This will encourage litigation, and will operate with considerable harshness on those functionaries. The servants of the Honourable Company are not as yet practised lawyers, capable of weighing every act and providing against any chicanery of law. Overloaded as they are with official business, it is impossible that mistakes should not sometimes occur—I say that the servants of the Company require that further discretion should be reposed in them, that they should be encouraged and upheld by Government; not, that they should be rendered fearful of acting, that checks upon checks should be multiplied, that all their official acts should be mistrusted, that security upon security should be demanded, that they should be personally amerced in damages and costs!

The chief directions regarding execution under this head, I find recorded in the circular order of the Sudder Dewanny Adawlut, under date 16th April, 1818*. It was observed by the court, that the rules in force relative to public suits contain no specific provision for the execution of decrees against Government, and that the general rules of process for the execution of decrees in favour of individuals amenable to the Zillah courts, namely, those contained in Section 7, Regulation IV. of 1793, cannot to

* Page 25 of printed Circular Orders, second part.

their full extent be applied to the enforcement of decrees against Government; also, that in the event of a judgment being passed against Government in any public suit, the officer intrusted with the management of the suit is required to send a copy of the decree to the Board under which he is placed, with such a report as may enable the Governor General, or rather that body, to decide, whether an appeal from the decision shall be preferred or otherwise. Also that it is provided by Section 9, Regulation II. of 1805, that copy of such decrees shall be transmitted by the court to the Secretary to Government in the Judicial Department. Those provisions, the court observed, are manifestly intended to give information of the passing of the decree, in order that the proper orders may be passed as to executing or contesting the decision. The court were of opinion, that money in any of the public treasuries should never be attached in execution by judicial process; in such case, a precept directing compliance with the decree is sufficient* ; nor in the opinion of the court would the rule referred to in the note be applicable to a case in which the collector might state objections to the immediate execution of a judgment against Government, under special instructions from the Go-

* The court is enabled to punish a collector by fine for wilful disobeyal of process. For this curious rule, see Section 36, Regulation XIV. of 1793.

vernor General in Council. If such objections be not admitted by the court, and no appeal be open, it may be concluded that the Governor General in Council would order the decree to be carried into effect; if not, a report on the case should be made to the Sudder Dewanny Adawlut for such order or reference to Government, as may be consistent with the regulations and with the circumstances of the case.

2ndly. Of execution—when officers or soldiers of the native army may be parties; it is directed by Section 8, Regulation XV. of 1816, that whenever any land or real property belonging to a native officer or soldier may be attached by a court of justice, for the purpose of realizing the amount of any judgment fine or penalty, notice of the same shall be issued by the court to the commanding officer, and the sale of the property shall be postponed, in order to afford time to the officer or soldier to discharge the amount due from him.

3rdly. Decrees summarily passed by collectors under the provisions of Regulation XIV. of 1824, in suits instituted in conformity with Regulations VII. of 1799 and V. of 1812, shall be executed by the civil court, as directed by Section 5 of the regulation first quoted—in which it is further enacted, that when a specific sum shall have been adjudged to be due, or any costs or damages awarded, such award

shall be executed by the judge; and generally whatever may be ordered by the summary judgment of the collector, consistently with the regulations, shall be carried into execution by the ordinary process of the civil court.

4thly. The awards of arbitrators, having in conformity with Regulations XVI. of 1793 and VI. of 1813, Section 2, been submitted to the court under the seal and signature of the person or persons by whom they may be made, together with all the proceedings, and a decree having been passed by the court conformably thereto, shall be carried into execution in like manner as other decrees of court. Private awards likewise, in disputes for land, shall under the 3rd Section of Regulation VI. of 1813, be enforced under summary process, subsidiary to the regular suit, as explained by the Circular Orders of the Sudder Dewanny Adawlut of the 24th February, 1826, but it is necessary that the petition for execution should be preferred within six months from the date of the award.

5thly, and lastly. Execution shall be specially made by the civil power, of the decrees passed by military courts of Requests, established by Section 22, Regulation XX. of 1810.

II. *Of how execution may be stayed or enforced;* and,

1*st*. *In original suits* decided exparte, or if the petition for execution be presented a year after the decision; or if the enforcement be desired against the heirs or representatives of the original parties, or if against only one of several parties affected by the decree; or if there be reason to believe that the parties have made some adjustment amongst themselves; in such cases the courts were directed (and it has been rendered imperative by Section 7, Regulation VII. of 1825), by clause 8, Section 15, Regulation XXVI. of 1814, to suspend the immediate execution of the decree, and issue notice to the party to attend by a certain day, a notice, partaking of the nature of the *scire facias* issued by the English Law on like occasions. Execution will be enforced, on the failure of the party to attend; on his attending, an order will be passed according to the merits, either absolving from the decree, admitting an appeal, or the like; but should there appear to be any intention of removing the property from which the decree is to be satisfied, the court may require sufficient security or proceed to attachment in default thereof.

2*ndly*. *In appeal*; and,

1*st*. As regards *real property*. It has been enacted by clause 2, Section 11, Regulation XIII. of 1808, that whenever a person claiming the proprietary right in lands, houses, or other immovable property,

shall have a decree in his favour, he shall obtain possession thereof in execution of such decree, notwithstanding an appeal therefrom; provided he shall give good and sufficient security for performing the decree which may be passed upon the appeal, in a sum equal to one year's produce of the property adjudged, if Malguzarry land; or ten years' produce, if the land be lakheraj; or the computed value, if it be a house or immovable property of any other description*; but it is added in clause 3, that the court to which the appeal may be preferred may, in special cases, allow the appellant to retain possession, on giving the like security; and it is further provided in the 4th clause, that whether the appellant or respondent be left in possession of lands paying revenue to Government, during an appeal, if the party in possession shall neglect to pay the revenue due, and the estate consequently be ordered for sale, the party not in possession by payment of said revenue, and giving the prescribed security previous to the sale, shall be put in immediate possession, and shall be entitled to charge the amount so paid with the legal interest thereupon, in any adjustment of accounts which may be directed in the final decree upon the cause. By Sections 4 and 5, Regulation V. of 1798, it is further declared, that when-

* By Section 3, Regulation V. of 1798, courts of appeal may, in particular cases, such as delay in decision, &c. require further security during appeals, if, on application of the parties, the security taken appear insufficient.

ever any land or real property, for which a judgment may have been obtained, but which during an appeal from such judgment by the party cast, may be left in the possession of the appellant, shall, while such appeal is pending, or before the ultimate judgment thereon be put in execution, be sold by Government, to make good an arrear of the public revenue due from the appellant, and shall be purchased by the respondent: the party so purchasing, in the event of such property being finally adjudged to him on the appeal, shall be entitled to recover from the appellant so left in possession, the full amount of his purchase-money, and of all expenses attending the purchase so made by him, with interest thereon at the rate of 12 per cent. per annum, in addition to any other sum which may be adjudged due to him on account of the profits arising from the land or other property in question, anterior to the sale. It is further declared, that in the case above supposed, if the respondent shall not have purchased the land or other property sold, to make good an arrear of public revenue due from the appellant left in possession thereof, and if the ultimate judgment in appeal be in favour of such respondent, he shall be entitled to recover from the appellant left in possession the amount of the purchase-money paid for the property so sold, and adjudged to the respondent: with interest thereon at the rate of 12 per cent. per annum, in addition to any other sum, which may

be adjudged to him on account of the profits arising from the property so sold, anterior to the sale of it; unless the property in question shall have been directly or indirectly purchased by the appellant himself or in his behalf; in which case, on clear proof thereof being made by respondent, to whom such property may be ultimately adjudged, he shall be entitled to the possession thereof, and to all profits arising therefrom as may be directed by the decree in the case, notwithstanding the fictitious sale supposed.

Section 5. The principles contained in the preceding Section are to be considered equally applicable to cases in which the plaintiff in a Zillah or city court may be put in possession of land or other property adjudged to him, during an appeal, in consequence of the defendant's failing to give security for staying the execution, as required by the regulations; and generally to all cases, in which the possession of property may be transferred by the decree of any court of justice, from which decree an appeal may be depending in a superior court:—and it is further enacted by Section 6, that as cases may occur wherein neither the appellant nor the respondent may be able to give the prescribed security for staying the execution of decrees, or for the execution thereof in favour of the plaintiff, as provided in Section 2, Regulation XIII. of 1796, and Section 3 of the regulation we are quoting, the property adjudged shall be held in attachment during the appeal, or until such time

as one of the parties may be able to give the required security, by the collector of the district, at the expense of the party who may be ultimately declared entitled thereto, under the directions of the court.

2ndly. As regards *personal property.* It is enacted by Section 12, Regulation XIII. of 1808, that decrees for property of that description shall be stayed or enforced on the same rules as those at present established, excepting, that the security to be given by appellants for staying the execution of decrees appealed from, or by respondents, when such decrees are carried into execution, during an appeal, shall be sufficient in addition to the amount or value adjudged to cover the interest that may be expected to arise upon the amount payable under the decree, if confirmed in appeal, according to the provision for adjudging interest in such cases, made by Section 3, Regulation XIII. of 1796. And,

III. *Thirdly. Of how execution is influenced by the nature of the right or property to be delivered in execution or sold in satisfaction—*

Now execution may be made, it is almost unnecessary to observe, by delivering the actual thing sued and decreed—execution of land may be made by voluntary delivery of seisin—or it may be perfected by taking out an Amin from the court, and by in-

sertion by the collector of the name of the successful party in his register of mutations, or by the mere act of insertion, should the victorious party have been previously in possession. The courts in fact are directed to forward to the collectorate copies of all decrees affecting the proprietary right to or possession of all lands, kheraj and lakheraj. Execution in Butwara is completed by the deputation of an Amin, under the superintendence of the collector, in conformity with Regulation XIX. of 1814—execution of personals by delivery of said personals by the Nazir or Sheriff—and lastly, it may happen that the property in dispute has already been deposited in the court, in which case, it only remains to deliver it to the party in whose favour judgment may have been passed.

But it is requisite that the property of the defendant should *be sold,* in order to satisfy the plaintiff's demand; and,

1*st. Where the land is Malguzarry,* that is to say, paying a revenue to Government—in such case, the plaintiff will present a miscellaneous petition to the court, praying that the Malguzarry land of said defendant may be sold in execution*. Hereupon the

* If defendant lives and has property in another Zillah, precept will be sent in order to its sale, to judge of said Zillah: an agent on the part of the Decreedar will attend to point out the defendant and property.

court, as directed by Section 2, Regulation XLV. of 1793, will submit a copy of the decree, with an English translation, to the local commissioner, which authority will direct the collector to expose for sale the *rights and interests* of the defaulter in the whole of the estate, or in such portion as may be deemed sufficient: and the courts are further enjoined by Circular Order of February 17th, 1816, nominally to sequestrate the lands in question, by deputing a chuprassy, but not to disturb the possession of the possessor. The countermanding or postponing of sales rest with the judicial authorities*. On objections being preferred, the collector, as directed by clause 4, Section 4, Regulation VII. of 1825, should communicate with the court, submitting such information as his own records may give, and should be guided by the instructions which he may receive in reply: by clause 5, the court is directed to hold a summary inquiry, and to pass an order on the merits, but it shall not be necessary for said court to postpone the sale where the objection may not have been preferred within a reasonable time after proclamation issued, and may appear to have been intentionally delayed with a view to obstruct the sale; and by Section 5, all judicial authorities, who may have ordered sales of land by revenue officers, are empowered to declare such sales null and void, order a resale, and

* The right of defaulters to rights and interests is frequently admitted by the courts on insufficient grounds.

direct the first purchase-money to be returned, if on summary inquiry any material irregularity be satisfactorily established.

After sale, the next step towards completing the execution is the payment of the surplus proceeds, after deducting the Government kheraj, to the plaintiff: on his miscellaneous petition a precept will issue from the court, directing such proceeds to be forwarded, and they will be delivered to the plaintiff on his receipt; and furthermore, where there are several claimants, as is frequently the case, the collector will forward the whole of the monies to the Adawlut, which will make an equitable distribution of them amongst the creditors of defendant*; but it is often necessary during this process, that the collector do remonstrate with, and better inform, the judicial authorities; the right of defaulters in the estates sold, and consequently in the proceeds thereof, not being sufficiently determinate, having been shown

* All creditors, according to the Mahommedan Law, are entitled to a *pro ratâ* distribution of the estate of a person deceased—no distinction is made on account of the debt being founded on simple contract, or on a promissory note or bond, or with reference to the date at which contracted—only difference is, that debts contracted or acknowledged on a death-bed sickness should be postponed until after the satisfaction of debts contracted *in sano corpore.*—Macnaghten's Mahommedan Law, pages 345, 346.

But the claim of a mortgagee is entitled to priority, he may pay himself out of the mortgage, 347.

to exist, not so much by the Inticali register as by the oaths of two *credible* witnesses, who have given their evidence before the court.

2*ndly*. Where the property is *real, other than Malguzarry ; large* portions of lakheraj land will, under Section 17, Regulation XLV. of 1793, be sold by the same process as that above noticed; but as I am led to believe that in consequence of the enactment of Regulation VII. of 1825, recourse is now seldom had to the revenue authorities for the sale of any other but Malguzarry lands, it behoves the supreme authority to affix a limit to the jurisdiction of the courts in this instance.

By clauses 2 and 3, Section 2, Regulation VII. of 1825, sales of houses, gardens, orchards, and *small* portions of lands, held exempt from the public assessment, shall be conducted by the judicial officers, in the same manner as of other personal property. It is required by clause 2, Section 3, to issue a proclamation thirty days previous to the sale, and by clause 3, to go through the usual process of attachment; and moreover, the court is authorized to annul the sale on any material irregularity, proved on petition presented within one month after the sale. The courts should apprise bidders of the nature of the rights and interests exposed for sale. Rent-free lands are transferred, liable to be resumed under the regulations in force,

and should be put up accordingly as "*hajut tujviz*,"—and under this head may be classed the *rights and interests* of defendants in *Talukdarries and all other Shikmee tenures*, as contradistinguished from those of Sudder Malguzars, as well as in the inferior tenures of lakheraj estates.

3rdly. Where the property *is purely personal*, it will be sold by the Nazir or Sheriff under the rules in force.

IV. *Fourthly*, and lastly, *How the person is affected in default of property wherewith to satisfy the decree*.

Now if the thing adjudged cannot be delivered, or judgment satisfied by the sale of property, either real or personal, the body of the defendant may be committed to close custody by the plaintiff; and provision is made for the relief of insolvent debtors and their sureties by Section 11, Regulation II. of 1806, chiefly based upon the laws in force in the mother-country, and to the effect, that when persons so situated are in confinement for the satisfaction of decrees, the courts are empowered, on receiving from such persons a full and fair account of all descriptions of property belonging to them, and on being satisfied of the truth thereof, and after selling such portion as may be saleable, to order the release of such persons from

confinement, and the right shall in all cases remain with the creditor to bring to sale in satisfaction any property of which the debtor may subsequently become possessed; also in cases where it may come to light that the debtor has fraudulently concealed any property, again to cause his arrest until judgment be satisfied*.

The only additional provision in this matter, which I have been able to discover is, that contained in the 7th clause of Section 45, Regulation XXIII. of 1814, wherein it is enacted, that to prevent the protracted imprisonment of persons confined in execution of decrees for sums of inconsiderable amount, no person shall be liable to personal confinement, in satisfaction of a decree for any sum not exceeding Rupees 64, beyond a period of six months, but the property of such person shall always be answerable under the rules above related. It is to be remarked, that the court of Sudder Dewanny Adawlut have decided†, that the Regulation of 1806, first quoted, has reference to all persons in confinement for decrees *summary* as well as regular.

* According to the Mahommedan Law, as laid down by Shafei, and the two disciples, when creditors petition a court of justice to prevent an insolvent debtor from alienating his property by sale or other obligation, an order to that effect may be granted.—Macnaghten, p. 218.

† See Circular Order of 31st Dec. 1824, p. 81.

The grounds of objection usually offered to execution are such of course as contest the right of the defendant in the property proposed for satisfaction; amongst which it is necessary that I should notice especially those advanced by Mahommedans under the pleas of *Hibah* and *Kavind.*

In cases of *Hibah or gift*, it is material to ascertain that the donee has actually obtained *possession*, without which the alienation is not completed*.

A distinction is made by Mahommedan lawyers between *Hibah bil Iwaz* and *Hibah ba Shurt-ool Iwaz.* Hibah bil Iwaz, mutual gift or gift for a consideration, is said to resemble a sale in all its properties, and the mutual seisin of the donees is not in all cases necessary—Hibah ba Shurt-ool Iwaz, on the other hand, resembles a sale in the first stage only, that is, before the consideration for which the gift is made has been received, and the seisin of the parties is therefore necessary.

But in cases of Kavind or dower, possession is not necessary, in as much as it is considered by the law in the light of a Hibah bil Iwaz, or gift for a consideration†, in this manner, a husband may assign over

* Macnaghten's Mahommedan Law, p. 50.

† Macnaghten's Mahommedan Law, pp. 51, 52; see also pp. 274, 276, where precedents having reference to these matters are clearly laid down.

to his wife by deed all his property movable and immovable, and her right thereto without seisin is completely established, and the ownership of the husband entirely divested; and furthermore, the claim of the widow for dower on the estate of her deceased husband will rank with the claims of all other creditors; and if the assets are not sufficient, a pro ratâ distribution must be made with respect to all.

I may observe, as applicable to the subject, that under the Hindu Law, property held jointly by several individuals is answerable in satisfaction of a decree to the extent of the debtor's share only; unless the debt were contracted for the benefit of the family at large*.

Other general matters of objection or Musahimat, will be decidable by the courts on the merits; and the courts will either release the property in toto or proceed with the execution, taking from the Decreedar sufficient security to answer any judgment or damages which may be afterwards obtained by the objector, according (as I have already stated) to the regulations in such case made and provided.

It remains, my judicial masters, to impress upon you, the importance of carefully deciding all summary

* Hindu Law, vol. ii. pp. 294-5.

and miscellaneous suits and proceedings, as the best means of nipping litigation in the bud, and stopping regular actions in limine—and the necessity of perfecting and completing execution in all cases. What use is it, if a person who has been declared entitled to a benefit by decree of court, is not conducted to that benefit? He obtains a demi-perfect—an incomplete justice—add to which, evil-disposed and litigious individuals, seeing the ineffective operation of the court, are encouraged to appear in the battle field of the law as plaintiffs without a just claim, as defendants without a true defence—it does indeed (if I may be allowed to continue the figure) put me in mind of a battery so badly served, that the enemy encompass it round about and take possession of it, and it tends to the discomfiture of its own army. Adieu, may God protect you. I wish to each one of you, (and in few cases, I am confident, will that wish be unrealized,)

Non inutilis toga,
Nec indiserta lingua nec turpis manus.

CHAPTER III.

HEAD I. Summary suits according to Regulation VII. of 1799—how proceeded in—may be tried exparte, &c. &c. Head II. Of summary suits, according to Regulation V. of 1812—distress and replevin defined, and the following matter discussed: 1*st*, who may distrain; 2*ndly*, what may be distrained; 3*rdly*, the grounds of plaint on the part of the individual whose property has been distrained; and 4*thly*, what documents are necessary to support and justify a distress. Head III. Of the summary suit for dispossession, according to Regulation XV. of 1824—jurisdiction formerly *possessed* by the Adawlut in cases of the kind, transferred to the magistrates, with a discretion in certain cases—provisions of Regulation XV. of 1824—necessity of limiting the jurisdiction—how decidable where a new right has been created—appealable on the merits by Regulation II. of 1829. Head IV. Miscellaneous proceedings having reference to the cultivation of the indigo plant, being: 1*st*, petitions presented in conformity with Section 3, Regulation VI. of 1823; 2*ndly*, the summary inquiry grounded upon the first and second clause of Section 5, Regulation VI. of 1823; 3*rdly*, the petition presented to the court under Section 5, Regulation V. of 1830. Head V. The miscellaneous proceeding having reference to the appointment of a Wasi or guardian—opportunity taken to state the distinction between the jurisdiction of the collectorate, under Regulation X. of 1793, *for purposes of revenue*; and of the court, in this instance *as a matter of law*—under Regulation I. of 1800—appointment

and duties of the Wasi so nominated. Head VI. Miscellaneous proceeding, having reference to the fore-closing of a conditional sale, held under Sections 7 and 8, Regulation XVII. of 1806—observations confined exclusively to the *ministerial* conduct of the courts under this head—how to proceed on petition presented—constructions of the court of Sudder Dewanny Adawlut and Circular Order of 22nd July, 1813, quoted. Head VII. Miscellaneous proceeding regarding the appointment of a Surburahkar, administrator or manager, which may happen; *1st*, Under Section 5, Regulation V. of 1799; *2ndly*, under clause 3, Section 5, Regulation VI. of 1813; *3rdly*, under Section 26, Regulation V. of 1812—provisions of Regulation V. of 1827, relating to the appointment of these functionaries by collectors—remarks thereon, and Circular Order of 20th April, 1827. Head VIII. Of the proceedings relating to the sale of dependant Talukahs for arrears of revenue; this may happen under Section 15, Regulation VII. of 1799—under the provisions of Regulation VIII. of 1819—sale may be also made of those tenures, especially denominated Putnee. Head IX. Miscellaneous proceeding founded upon Section 28, Regulation XI. of 1822, whereby purchasers at public sales complete their possession. Concluding remarks as to injunctions generally, and procedure thereon.

Head I.

1. *Summary suits for rent, of the current year*, are instituted by Sudder proprietors, in conformity with the *provisions of Regulation* VII. *of* 1799. The first proceeding is by *arrest*, but before permitting the Dustuc to issue, it is advisable that the courts do in-

variably require the plaintiff to enter the documents upon which his claim is founded*. On the apprehension of the defaulter, the court will make a summary inquiry into the merits of the case; dismissing the suit, if it appear that the arrear or the greater portion of it is not due, and that the demand has been mis-stated, with costs and equitable damages against the plaintiff†; otherwise, committing the defendant to jail until he liquidate the plaintiff's demand, or until plaintiff applies for his release. By the 16th Section, Regulation XIX. of 1817, the defaulter may be admitted to give security for attendance until the case be investigated and decided, whenever he may deny the demand.

By the provisions of clause 3, Section 18, Regulation VIII. of 1819, it has been decided, that these summary investigations can be made *exparte*, for, " if after diligent search the return of the Nazir be non est inventus, it shall be optional with the plaintiff to move the court by his Vakeel, to solicit a postponement of the case for a month, in order to cause

* Under Section 19, Regulation VIII. of 1819, process of arrest may be taken out from the court having jurisdiction over the tenure, or from that of the district wherein the defaulter may be at the time residing.

† Damages are seldom if ever awarded to defendants in summary investigations under this head, but see Note to p. 56, Head VII. chapter I.

a second process of arrest to be served in the course of it, and then to have a notice issued, and the case brought to judgment; or to cause proclamation to be made, that after fifteen days, the court will proceed to a summary investigation and decision exparte. These suits may be referred to collectors under Regulation XIV. of 1824, and are only appealable by means of a regular action.

Head II.

II. *Summary suits* instituted in conformity with the provisions *of Regulation* V. *of* 1812; by which defaulters and their sureties are allowed to dispute the demand of individuals distraining for arrears of rent; and the attachment is to be withdrawn on proper security being given by said defaulter or his security to institute a summary suit within fifteen days, to try the justness of the demand. It was found requisite to confer the benefits comprised in this enactment on the under-tenantry, in order to counteract the power which was placed in the hands of Sudder proprietors, by Regulation VII. of 1799.

Distress is defined by the English Law, (and the proceeding under consideration is merely a branch of the great legal tree of the mother-country,) to be, "the taking of a personal chattel out of the possession of

the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed."

Replevin "is founded upon a distress, and is a deliverance of it, that the thing distrained may remain with the first possessor, on security being given by him to try the right with the distrainor at law."—Now I will consider—

1*st*. Who may distrain?

2*ndly*. What may be distrained?

3*rdly*. The grounds of plaint on the part of the defaulter or plaintiff, whereby the right of the distrainor to the distress is traversed or denied.

4*thly*. What documents are necessary to support and justify a distress on the distrainor making avowry—

I. *Who may distrain?* By Section 2, Regulation XVII. of 1793, all proprietors of land; and may delegate the like power to their Naibs or Gomashtahs;—and all farmers and under-farmers and dependent Talukdars: the heirs and successors to the above, for arrears due to their ancestors: also managers of estates of disqualified land-holders*: managers of joint-undivided estates,—collectors while holding estates under Kham management,—and mortgagors*:

* Section 19, Regulation VII. of 1799.

lakherajdars of every description, for it was declared by the Sudder Dewanny Adawlut, under dates the 4th January 1798, and 22nd January, 1805, that the rules for distress and summary process being general, must be considered applicable to lands lakheraj as well as kheraj.

II. *What may be distrained, or rather what may not be distrained?* By Section 3, Regulation XVII. of 1793, lands, houses, and real property; and by Section 4 of that Regulation, and Section 14, Regulation V. of 1812, ploughs or implements of husbandry, plough-cattle or seed-grain may not be distrained: all other personal property may therefore be distrained.

III. *The grounds of plaint on the part of the defaulter,* who has now given his security, and succeeded to the character of plaintiff, will be that he has paid the whole amount for which distress was levied: or that he holds no land of the distrainor, now the defendant or avowant, but of a third person, who is thus called up to become a party to the suit, under much the same circumstances as I have already detailed in Heads VI. and VII. of regular actions relating to land and its revenue.

IV. *Of the documents necessary to support a distraint.* These will be to be advanced on the part of the distrainor, now the defendant or avowant. By the cor-

respondence quoted by Mr. Harington*, in his Analysis, it would appear to have been decided by the Sudder Dewanny Adawlut, that distrainors are not bound by the Regulations to produce the caboulicts of defaulters to Moonsiffs, on requiring them to proceed to sale of distrained property; but the court remarked at the same time, that the provisions for distraint suppose that the distrainor is in *actual possession* of the lands for which the distraint is made.

No doubt, that in all possible cases, distrainors should be required to advance proofs of their actual possession: but this will frequently operate with harshness upon purchasers at public sales, who find a difficulty in bringing their tenantry to engagements; upon farmers holding under the court of wards, and most particularly upon Kham Tahsildars acting under the orders of the state. I think that with great caution, Nilami Chittas, Towjis signed by the revenue authorities, and evidence of Pergunnah rates should be admitted, in lieu of direct engagements, to justify a distress, when the right is brought to trial by the summary process under consideration.

* Vol. iii. p. 540.

Head III.

III. *In the third place*, I will treat of the summary suit for dispossession from lands or premises, instituted under the provisions of Regulation XV. of 1824, and cognizable by the Zillah magistrate; and I am the more anxious to recommend it to the readers' attention, because it has been adopted by our native subjects in a degree much exceeding that in which our legislative enactments are generally resorted to: it being too frequently their fate to lie unheeded, *leges mortuæ et unadaptatæ;* unapplied to the process or defect of law, for which they were originally intended.

By Regulation XLIX. of 1793, the Zillah courts were authorized, in cases of forcible dispossession from lands or other property, summarily to investigate the matter, and to place the previous possessor in possession, his previous possession being satisfactorily proved, without reference to the right of the dispossessing party; and also to restore to the person dispossessed the value of his crops, should they have been damaged or destroyed, and to award against the dispossessing person equitable damages and costs. By Section 5, Regulation VI. of 1813, the like investigation was directed to be made and decision passed on the documents of the parties, in cases where it might be certified to the Dewanny by the Foujdarry

court that disputes existed likely to terminate in a breach of the peace; but now the jurisdiction in matters of this kind has been almost entirely thrown into the hands of the magistrates by the enactment of 1824, excepting in some few instances of miscellaneous petitions or prayers for injunctions to the civil courts, having reference to suits which may be at the time pending.

By Section 3, Regulation XV. the magistrate, whenever it may appear from any proceeding in the Foujdarry court, that disputes exist concerning any lands or premises, or the right to irrigation, likely to terminate in a breach of the peace, if not speedily adjusted, is directed to address purwannahs to the parties, calling upon them to attend the court in person, or by Vakeel, and to deliver a written statement of their possession, and to adduce proof of their having been dispossessed or disturbed in their possession by the adverse party; whereupon the court, after an investigation of the statements and evidence of both parties, shall proceed to pass a summary decision *on the merits of the case*, and *the party in whose favour judgment may be passed* shall be maintained in possession, until the award may be altered or reversed on the institution and decision of a regular suit in the civil court. Now, although by the enactment of 1793, the court was directed to award possession to the party proved to

have been evidently dispossessed, *without regard being had to the claim of the dispossessing party*, yet a greater latitude, it appears to me, is given to the magistrate by the rules in present force: inasmuch as his decision is directed to be *on the merits of the case;* that is, as I comprehend it, he is to award possession to such of the parties as may appear most entitled to hold it.

Proceedings of this nature are now generally commenced by petition, and as the criminal courts have assumed to themselves, in the investigation of them, a more extended jurisdiction than was originally intended; entering upon disputed points *not likely to terminate in breaches of the peace*, and taking upon themselves the cognizance of matters appertaining to civil law; I am of opinion, that their jurisdiction should be limited by a declaratory enactment.

Although it is usually the practice, in conformity with the spirit of the former regulations, to continue possession in the previous possessor, yet cases will no doubt occur in which it is consonant with justice to award it to the party dispossessing, particularly where no actual violence may have occurred: and in such cases, the magistrate will avail himself of the discretion which appears to be vested in him by the enactment of 1824.

Where no previous possession can be proved,—for instance, *where a new right has been created*, as *if* A, the ancestor, who held possession to the time of his death, demises, and B and C contend for the possession of his landed property,—the most preferable plan, but which should be resorted to as seldom as possible, because it is injurious to the collection of the Government revenue*, (I suppose the property in dispute to be kheraj,) is to request the civil court to appoint a manager under the regulations in force, and in the manner provided by Regulation V. of 1827; and frequently the court will find its advantage in appointing to this trust† one of the contending parties, taking care that adequate security is furnished by him. Again, where small parcels of land are under dispute, the magistrate may maintain in possession *the actual cultivator*, allowing him to pay his revenue to either party at his own peril, or to enter it into court; and providing in the decision against his assumption of a permanent *right of occupancy*‡, where he may have no right thereto. These suits, formerly appealable only on the grounds of irrelevancy, are now by Regulation II. of 1829, appealable on the merits; but the first appeal to the commissioner of circuit is declared to be conclusive.

* See clause 3, Section 3, Regulation XI. of 1822.

† Section 4, Regulation V. of 1799.

‡ He may be a tenant of the Paikashto species, or a Kashtokar simply.

Head IV.

IV. *Fourthly*. I will state briefly those miscellaneous proceedings of the civil court, which arise out of the cultivation of the indigo plant. And,

I. Petitions presented in conformity with Section 3, Regulation VI. of 1823, when individuals who have made advances for the delivery of the plant have reason to believe that the ryut is about to evade such engagements by making away with the crop, or delivering it to another. It is necessary that the original engagement should be entered, and that it should be certified in the petition that said engagement was executed *bonâ fide* and voluntarily; if, on hearing, the petition be proved, the court is directed to make a summary award, adjudging to petitioner the right of receiving the crop, according to the terms of the agreement. If the allegations be not proved, the court will dismiss the petition with costs, and compensation if considered necessary; and in such summary inquiries any objections offered by a third party are to be heard and decided upon, preference being always given to engagements registered under Regulation XX. of 1812, and the court, when the crop under litigation will suffer damage if not immediately cut, is empowered to order its delivery to either party* as specific pecuniary compensation,

* Such party consenting to pay proper compensation to the other party, should the final award be against himself; a manu-

regulated by the estimated produce of the ground and its value when manufactured.

II. *Secondly.* The summary investigation, grounded upon the first and second clauses of Section 5, Regulation VI. of 1823, wherein it is optional with individuals who have been injured by breach of contract for the cultivation and delivery of the indigo plant to institute a summary suit, and the court, if deciding in favour of the plaintiff, shall subject the defendant to the payment of the amount of the advances actually received by him, with interest on the same, and costs of summary process.

III. *Thirdly and lastly.* The petition presented to the court, as prescribed by Section 5, Regulation V. of 1830, whereby individuals desirous of discontinuing the cultivation of indigo, and of settling with the planter, are enabled, should the planter refuse to come to a settlement, to present a petition to the court; after a summary inquiry into the merits the courts shall, on proof of the expiration of the contract, and of there being no balance due from the petitioner, or on the petitioner depositing in court any balance which may be adjudged to be due from him, grant him a release from his engagements, and pay over the balance to the planter; should the

facturer so receiving crops, answerable, conjointly with the ryut, for arrears of rent to the landholder.

planter refuse to accept it, the court shall return it to the petitioner, leaving the defendant to seek his remedy by regular suit.

Head V.

V. *A fifth kind* of miscellaneous proceeding has reference to the appointment by the court of a Wasi or guardian; and as a favourable opportunity here presents itself, I will exhibit to the reader the marked distinction which exists between the jurisdiction of the Board of Revenue and collectorate *as a Court of Wards*, and the appointment of a manager and guardian by those authorities, *for purposes of revenue*; and between the procedure of the Adawlut in this instance, *as a matter of law*.

I. The superintendence, then, of the Court of Wards, as constituted by Regulation X. of 1793, extends to the persons and estates of all proprietors of entire estates paying revenue immediately to Government, who are or may be females not deemed by the Governor General in Council competent to the management of their own estates*; minors, and

* By Regulation L. of 1793, the Court of Wards is empowered to invest female proprietors with the management of their estates, when deemed qualified for the charge, reporting the same to Government.

idiots, and lunatics, and others, rendered incapable of such management by natural defects or infirmities of whatever nature; but not to the proprietors of estates not paying revenue immediately to Government, nor to joint proprietors of estates paying revenue immediately to Government, both or all of whom may not be disqualified as above. And the general superintendence of wards in England has been delegated by the Crown to the Court of Chancery (to which has been superadded that of idiots and lunatics), until they shall attain the age of twenty-one, always excepting the appointment of testamentary guardians under the statutes of Philip and Mary, and 12 Car. II. cap. 24.

The period at which minority determines, is sixteen years by the Mahommedan Law; by the Hindu Law, fifteen in Bengal; and sixteen, according to the Benares school. By Section 2, Regulation XXVI. of 1793, it is fixed at eighteen years in both cases; and the guardianship of the minor is directed, as in the English Law, in no instance to be entrusted to the legal heir of the ward, or other person interested in outliving him.

The custody of the wards and their property is entrusted to the collectors by the ruling power, and it is usual, in conformity with Regulation VI. of 1822, to farm out the entire estates, both kheraj and la-

kheraj, on good security, for the term of ten years or less, as the case may be ; and at the same time to appoint a manager and guardian to collect the rents of the joint-undivided property, and to superintend the education and yearly expences of the disqualified landholder and his family*. The sum allowed for maintenance is denominated Mushahirah, and all surplus monies carried to the credit of the minor, should be laid out in the purchase of landed property or vested in the Government securities to his future benefit. All extraordinary sums should be separately and exclusively audited, previous to disbursal, by the commissioner of revenue. By Section 3, clause 2, Regulation XI. of 1822, estates under the superintendence of a court of wards shall not be liable to sale for arrears accruing during the period they may be so managed; and by Regulation III. of 1796, in order to prevent landholders availing themselves of the provisions of Regulation X. of 1793, by transfer of their estates to their minor sons, in order to bring them under wardship, and thereby preclude their sale for arrears of revenue, the ordinary jurisdiction of the court is

* It is expedient to take security from the manager, and to proceed to sale on it, should arrears accrue; also, to cause said manager to engage to enter into the Government treasury, for the benefit of the minor, all sums collected in excess of the Sudder Jumma :—but it is not required by regulation to stay the sale of joint-undivided property, of which the minor has a share.

declared to extend only to such estates as may devolve to disqualified proprietors *in the regular course of inheritance*; and lastly, minors and others having guardians, are not liable to be sued but under the protection and joint names of said guardians, but may sue their guardians or the collector by prochein ami.

To sum up the several predicaments of the revenue jurisdiction, Seyud Ameer, the proprietor, the Sudder Malguzar of an *entire estate settled in perpetuity*, demises, leaving minor heirs, the estate will be a fit subject for the jurisdiction. Seyud Ameer, *the Sudder sharer in a joint undivided estate*, demises, it will not be necessary in this case for purposes of revenue that the jurisdiction should be applied. Seyud Ameer leaves property, *both entire and joint*; the jurisdiction will be complete *as regards the first*, and will carry with it a kind of *collateral jurisdiction* as regards *the second.*

II. Now with respect to the superintendence of the Adawlut; the courts are enjoined from exercising any interference in the regular course of the descent and management of property, excepting under the following circumstances:—It is provided by Regulation I. of 1800, that in all cases *of joint-undivided estates*, when one or more of the proprietors shall die, leaving heirs who are under age, lunatics or idiots,

and without nominating *by will* a guardian or guardians to such heirs, it shall be the duty of the judge under whose jurisdiction such estate may be situated, or the principal part of it, in the event of its being situated in two or more jurisdictions, on the receipt of a report from the collector, or from any other person or persons interested in the welfare of the family of the deceased, stating the grounds upon which he or they may consider the next of kin as unfit to be entrusted with the care of the person or management of the estate of the heir, to investigate the nature of their objections to the nearest of kin, and if satisfied that they are well founded, to nominate some other person of character and respectability to act as guardian of the heir, reporting the circumstance in every instance to the Sudder Dewanny Adawlut; but such guardianship is in no instance to be entrusted to the legal heir or other person interested in outliving the ward. The guardians so appointed are to be furnished with a commission under the seal and signature of the judge, previous to the delivery of which they are to give security for their appearance during the continuance of the trust, and are to execute a solemn obligation for the zealous and faithful discharge of it. They are to have the care of the persons, maintenance, and education of the wards; are to vote in the election of a manager of the joint-undivided estate; are to receive from the said manager such portion of the profits as their wards may be

entitled to on a fair distribution; and finally to superintend all suits, either regular or summary, in which their wards may be concerned. Estates while under the superintendance of a manager, as aforesaid, are answerable for the payment of the public revenue, and liable to be sold for arrears*.

HEAD VI.

VI. Having under the sixth head in my first chapter noticed the general rules on the same subject, I will here state briefly, and *sixthly*, that miscellaneous proceeding of the Adawlut on petition presented, to foreclose and render absolute a conditional sale entitled Bye-bil Waffa or Cat Cabalah, in conformity with the provisions of Sections 7 and 8, Regulation XVII. of 1806; a regulation enacted, in the words of its preamble, for the purpose of preventing improvident and injurious transfers of landed property, and extending, in Mr. Harington's opinion†, to Indian landholders, the equity of redemption allowed by the English Courts of Equity, whereby the mortgagor is permitted, though a mortgage be forfeited, and the estate absolutely vested in the mortgagee by common

* And I should conceive that on petition presented, the jurisdiction of the courts might be extended to joint-undivided property and entire estates, *Shikmee*; being dependent tenures, talukdarry and ryutty.

† See Harington's Analysis, vol. i. p. 203.

law, if the estate be of greater value than the sum lent thereon, at any reasonable time to recal or redeem his estate on paying to the mortgagee his principal, interest and expences.

But the general rules in matters of this description having, as I have before observed, been more conveniently treated of in the regular action, I shall confine myself exclusively to the *ministerial* conduct of the courts in miscellaneous petitions of this nature; premising, that no conditional sale on mortgage can be foreclosed or considered by the courts as foreclosed, unless the mortgagee apply to the court either in person or by Vakeel in the manner perscribed by this regulation*. Even after judgment given against a mortgagor, who sued to redeem the mortgaged property on the plea that he had tendered repayment of the money borrowed, it has been held that the mortgagee is not thereby entitled to foreclosure, without recourse to the rules prescribed by Regulation XVII. of 1806†.

* See decision in case of Bhowani Sahai, appellant, *versus* Akraj Lall, respondent, Sudder Dewanny Adawlut Reports, vol. iii. p. 225. A kind of exception to the above appears in the case of Puddum Churn, and others, *versus* Ram Das Pandey and others, when the property had been intermediately sold by public auction, and the mortgagor had omitted to stay said sale, or to prefer an appeal in due time against the former decision of the Zillah court, vol. ii. Sudder Dewanny Adawlut Reports, p. 200.

† Sudder Dewanny Adawlut Reports, vol. iii. p. 225.

On receipt of the petition presented, according to which, the judge is directed to cause the mortgagor, or his legal representative, to be furnished as soon as possible with a copy of it, and at the same time to notify to him by a purwannah, that if he shall not redeem the property mortgaged, either by payment of the amount, calculated by the rules exhibited under Head VI. of action, or by full proof of legal tender, or by deposit in court, within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale become conclusive. The period of one year must be calculated from the date of such written notification, as expressly mentioned by Section 8, and as construed by the court of Sudder Dewanny Adawlut, under date 23rd January, 1817, who further instructed the courts on the 9th of April of the same year, that notifications should bear the date on which they may be actually issued, and in conformity with the intention of the legislature, should be issued as soon as possible after the application of the mortgagee for a foreclosure.

It will be sufficient that I close this head by quoting the Circular Order of the 22nd July, 1813*. The court remarked that the sole intention of Section 8, Regulation XVII. of 1806, was to prevent conditional sales from becoming absolute until the mortgagor shall have received from the court a notice that the

* Circular Orders, p. 26.

mortgagee has demanded payment of the amount due upon the contract. The duty of the judges under this section is, as far as the mortgagee is concerned, merely *ministerial,* leaving them nothing to do, but to cause the prescribed purwannah to be served on the mortgagor, and to receive and pay over to the mortgagee, if desirous of receiving the same, whatever amount may be paid in by the mortgagor, or if the mortgagee should refuse to accept the same, to restore it to the mortgagor, and to receive due proof of the service of the purwannah as above: but the courts have *not power to give summary possession* of the lands conditionally sold to the mortgagee, in the event of the mortgagor failing to make payment in the manner prescribed; as it would follow on that construction, that a person might be compelled to pay a large sum of money, or be ousted of his estate upon the demand of another, without the least inquiry or proof, though he should deny the authenticity or validity of the said engagement. But should the mortgagor fail to make the payment demanded, he will do so on his own responsibility; for should it prove that the alleged conditional sale was authentic and valid, and that any part of the amount demanded was due, the sale will have become absolute, and the mortgagor, will *on a suit being brought against* him, lose his lands—but *mortgagors* are entitled in the opinion of the court, though the law is merely ministerial as regards *mortgagees,* to receive possession, summarily

without suit, on complying with the conditions prescribed by Section 2, Regulation I. of 1798*.

Head VII.

VII. *A seventh species* of miscellaneous petition is for the appointment of a Surburahkar, administrator, or manager; in considering which I will state—*first*, under what circumstances this may happen, and *secondly*, how the appointment is made.

I. Now this may happen—

1*st*. Under Section 5, Regulation V. of 1799, which enacts that in the event of none of the claimants to the estate of a person dying intestate being able to give the security required by Section 4†, and in all

* This has reference of course to usufructuary mortgages,—it sometimes happens, that possession is had, in conditional sales on mortgage, in lieu of interest—vide p. 48, 49.

† Section 4. If the right of succession to an estate be disputed between several claimants, one or more of whom may have taken possession, the judge on a regular suit being preferred by the party out of possession, shall take good and sufficient security from the party or parties in possession, for his or their compliance with the judgment that may be passed in the suit; or in default of such security being given within a reasonable period, may give possession until the suit be determined to the other party, who may be able to give such security, such possession not in any way to affect the right of property, but to be considered merely in the light of an administration.

cases wherein there may be no person authorized and willing to take charge of the landed estate of a person deceased, the judge within whose jurisdiction the estate may be situated, or in which the deceased may have resided, or the principal part of the estate may be, in the event of its being situated within two or more jurisdictions, is authorized to appoint an administrator for the due care and management of such estate, until, in the former case, the suit depending between the several claimants shall have been determined, or in the latter case, until the legal heir of the estate, or other persons entitled to receive charge thereof as executor, administrator, or otherwise, shall attend and claim the same, when if the judge be satisfied that the claim is well grounded, or if the same be established on any inquiry that may appear necessary, the administrator appointed by the court, shall deliver the estate to him, with a full and just account of all receipts and disbursements during the period of his administration.

2nly. Under clause 3, Section 5, Regulation VI. of 1813, where in cases of dispossession, if the fact of possession could not be ascertained, an administrator might be appointed by the court, and I hold such a course of procedure to be often expedient, and equally applicable to suits investigated under the provisions of Regulation XV. of 1824.

3rdly. Under Section 26, Regulation V. of 1812, by which a greater latitude is given to the courts in the appointment of managers, inasmuch as they are empowered, whenever sufficient cause may be shown by the revenue authorities or by any other individuals holding an interest in an estate, to appoint a person duly qualified, and with adequate security, to manage the same. And,

II. How the appointment is made. The appointment of managers or administrators, and the superintendence of estates*, under attachment by orders of the courts of justice, is vested in collectors by Section 3, Regulation V. of 1827, and very properly so; because those officers are more conversant in matters of the kind, and are interested in the due collection of the Government revenues: the judge is directed to issue his precept to the collectorate, requesting that authority to hold the estate in attachment, and to appoint a person under good and adequate security for the due care and management of the estate: a salary and establishment are allowed to the manager, in proportion to the extent of the property attached. In the security bond, the manager should be held responsible for any misbehaviour or embezzlement on the part of the inferior officers employed under him,

* *Estates of Sudder Malguzars*;—I would continue with the courts the superintendence of *estates of inferior tenure*, under the several predicaments noticed above.

and by him appointed, and the issuing of a precept of attachment, and the appointment of the manager, may be objected to by petition, either to the commissioner of revenue or of appeal, as the case may be.

In conclusion, I would again inculcate the expediency of resorting as seldom as possible to this measure, as being likely to inflict a loss on the joint proprietors, and to interfere in the collection of the Government kheraj, it being always preferable in my opinion, in accordance with the spirit of that part of Regulation V. of 1799, quoted above, to leave one party in possession, on his furnishing adequate security. And I would call the attention of the reader to the Circular Order of the 20th April, 1827, the case alluded to in which, was probably the cause of the enactment of Regulation V. of 1827.

"The court remark, that the representation made by the proprietor at the time of sale of the estate was substantially true, for on the date in question there was lying in the treasury of the court, the sum of 151 Rupees, revenue realised from the Mahaul, on account of a share of it, attached by order of the court, though no arrangements were made for defraying the public revenue due on this share in the manner provided by clause 3, Section 5, Regulation VI. of 1813, authorizing the attachment. Under these circumstances, although the attachment did not ex-

empt the lands from sale, and according to the letter and spirit of Regulation XI. of 1822*, the sale would not be liable to be reversed for an irregularity which occurred in the *judicial proceedings* adopted in regard to the Mahaul, still the collector, when informed by the proprietor, of the existence of this amount, might have postponed the sale to ascertain the fact, or to allow time to bring the money to the treasury, which he did not do:—an arrangement is therefour desired by His Lordship in Council for restoring the Mahaul to its former proprietor."

HEAD VIII.

VIII. *Eighthly.* Of the petition, in order to the sale of a dependent Talukah for arrears of revenue due to the Sudder proprietor.

Under the provisions of Section 15, Regulation VII. of 1799, on the confinement of a defaulter, of whatever denomination, by summary process, the proprietor or farmer to whom the arrear may be due may attach his tenure, and collect therefrom the arrears of rent due, with interest; but the attaching party is enjoined not to make any undue exactions of rent form the *cultivators* or *under-tenants* beyond what the defaulter would have been entitled to receive, and the attachment is directed to be withdrawn on payment of the arrear, within the year. Should

* See Section 38.

however the arrear be not liquidated within the year, the Sudder proprietor is authorised to make such provision for the further receipt of his rents as may be consistent with the rights of all persons concerned; and if the defaulter be a *dependent Talukdar*, or the holder of any other tenure, which by the title deeds or established usage of the country is transferable by sale or otherwise, it may *be brought to sale* by applica-sion to the Dewanny Adawlut—and the purchaser will become the tenant for the new year.

It is further provided by Section 18, Regulation VIII. of 1819, that on the institution by the Sudder proprietor of a summary suit for arrears against the holder of any tenure intermediate between the Sudder Malguzar and the actual cultivators, it shall be competent to the party who may have instituted such suit, whether the alleged defaulter shall have been *arrested or not*, to send a Sazawal of his own authority to attach and collect the rents of the actual cultivators immediately from themselves. Provided, that the arrear of rent claimed shall have been actually due for one entire month before the date of attachment, and shall not be less in amount than the entire kist of the month, on accouut of which the arrear may be claimed.

After any arrear has been adjudged due by a summary suit, *limited intermediate interests* may be can-*

* As contradistinguished from the tenures of resident ryuts.

celled by Sudder Malguzars, but no summary award for arrears shall subject *real property to sale*, except in the case of those tenures to which we have before alluded, namely, which by the title-deeds or established usage of the country are transferable by sale or otherwise, or of those tenures since especially denominated Putnee; such real property to be subject to sale only on obtaining a decree *in a regular suit.*

Putnee Talukahs are declared by Section 3, Regulation VIII. of 1819, to be valid, transferable, and answerable for debt, and described in the preamble to that same enactment "to be a tenure which had its origin on the estates of the Rajah of Burdwan, but has since been extended to other Zemindarries, the character of which tenure is, that it is a Taluk created by the Zemindar, to be held at a rent fixed in perpetuity by the lessee and his heirs; the tenant is called upon to furnish collateral security for the rent and for his conduct generally, or he is excused from this obligation at the Zemindar's discretion; but even if the original tenant be excused, still in case of sale for arrears or other operation tending to the introduction of another tenant, such new incumbent has always in practice been liable to be so called upon at the option of the Zemindar; by the terms also of the engagements interchanged, it is amongst other stipulations provided, that in case of an arrear accruing, the tenure may be *brought to sale by the Zemindar,*

and if the sale do not yield a sufficient amount, to make good the balance of rent at the time due, the remaining property of the defaulter shall be further answerable for the demand."

Head IX.

IX. *Ninthly*, and lastly, I will briefly notice that miscellaneous proceeding of the court, founded upon the 28th Section, Regulation XI. of 1822, whereby purchases at public sales attempt to complete their possession. The Section above quoted, after defining the manner in which the collector is to give possession, namely, by publishing at the head Cacharee of the purgunnah or other Mehaul sold, and at the Dewanny Adawlut, a statement of the land sold, the name of the purchaser, the date of his purchase, and his succession to all the rights of the former possessor in the lands so exhibited, enacts, that if any further measures be necessary, the collector shall apply to the judge, who on inspection of the proclamation above noticed shall put the purchaser in possession of the property therein specified, by the usual process for giving possession of landed property under decrees of court*. Now the usual process

* Sudder Dewanny Adawlut, in case of Nill Govind Mitter, *versus* Abdool Hakim, on the 18th September, 1805, held that this rule was not meant to authorise the dispossession of parties in actual possession of any part of the lands specified, and claiming the property of them.

adopted is the deputation of an Amin, whose procedure, as is observed in Head IV. of my second chapter, is frequently the object of much injustice and litigation, and I would recommend that the appointment and supervision of these individuals should be transferred from the court to the collector, because the latter functionaries are more intimately acquainted with matters of revenue, better capable of superintending and checking the acts of the Amins, preventing the formation of fraudulent Chittas, and causing the exact property to be delivered to the purchaser.

In conclusion, I may state, that the court is frequently approached by miscellaneous petition, in order that orders and injunctions in matters connected with causes sub judice may be obtained; as to stay the digging of a tank—to prevent the destruction and defacement of premises or lands, for which the petitioner has laid his claim at civil law: in these cases, it is usual to require said petitioner to make affidavit to the truth of his statement, and to issue an *Ihlam namah* or notice to the other party, calling upon him to appear within two weeks, and show cause why the injunction should not be granted: in the event of such party failing to show cause, the injunction will be granted. On his appearing and entering into adequate security for defraying any loss or damages which may accrue to the property from such alteration or defacement, in the event of

the petitioner ultimately obtaining a decree, the injunction, unless under particular circumstances, will be refused.

NOTE TO PAGE

SINCE writing the foregoing, I have observed, that the application of the provisions of Regulation XV. of 1824, has been limited by the Circular Instructions of the Sudder Nizamut Adawlut, under date the 17th December, 1830*.

The court construe, that the regulation "was never intended to apply to mere *kasthkars* or cultivators of the soil, or in other words to persons having no property in the soil, but merely disputing about the right to cultivate," and this Construction is stated to exclude from the operation of the regulation "not only disputes between their *Zemindars* and their *ryuts*, but also between *Zemindars* and their farmers, and in fact between all parties not having such permanent interest in the land or other property of which the possession is disputed."

In the third paragraph, it is stated, that "Regulations VII. of 1799, V. of 1812, and subsequent enactments vest Sudder Malguzars with the right (under responsibility to the civil courts for its legal and just exercise) to attach, i. e. to take temporary possession of the lands occupied by their *ryuts, talukdars*, and farmers, for default in the payment of their rent; and to oust them altogether from their tenures, at *the expiration of the term of their pottas*, if they refuse to execute new engagements. These enactments have not been rescinded, and so long as they shall continue in force, the claims of *ryuts, talukdars*, or farmers to be restored to the management of lands from which they have been ousted by their landlord cannot be decided in a bare

* See Circular Orders of the Sudder Nizamut Adawlut, vol. ii. p. 87, et seq. Baptist Mission Press Edition.

ascertainment of the fact of possession, and cannot therefore be cognisable by a magistrate under Regulation XV. of 1824."

By paragraph 6, a very proper exception is made in the case of *two ryuts and two farmers of different estates*, the *proprietors* being made parties to the suit by *Ihlam namah*. This important principle, upon which the preservation of the permanent settlement so mainly depends, should never be lost sight of, and in all matters involving the lessening or augmentation of his estate, the Sudder Malguzar should invariably have notice to appear.

And by paragraph 7, a further exception is made in favour of *Putneedars, Mocurrereedars, and Lakherajdars*, having a transferable proprietory right in their tenures, in cases of dispute relating merely *to the boundaries or the possession* of the tenures, and not involving any question regarding the performance of the conditions or the validity of the title under which these are held. Notice being given in like manner to the Zemindar.

I will take the liberty of adding a few observations, in reference to the substance of these circular instructions, and in accordance with the principles which I have endeavoured to maintain in the course of the treatise*.

I perfectly concur in the court's opinion as first expressed in 1827†, that mere kastokars when ejected by the person by whom they are employed, in short that all persons having no property in the soil, should be excluded from the operation of the enactment in question. The court too might have worded their instructions "disputes regarding the *mere right to collect*," as well as the *right to cultivate*; thus, the mere agents and servants of the Zemindar, Gomashtahs, and Ihtimamdars and farmers‡ are of

* See notices respecting the under-tenures, pp. 113 to 120.

† See the Circular Order under discussion.

‡ Farmers would have their remedy in an action of account. See pp. 38-9, Head IV. chapter 1, or in action for the return of a valuable consideration. See p. 143, Head VIII. chapter 2.

course excluded from the operation of the regulation. With the above alteration, I would confine the limitation *expressly to the first construction of the court,* as comprised in the 2nd paragraph of the Circular Order under notice.

But in the cases of *Talukdars and ryuts in general*; I would still continue in the magistrates, or the authority in which the decision of these suits may be vested, (which it appears to me had better be, as in former times, the judicial, the magistrate merely certifying that disputes exist, likely to terminate in a breach of the peace, taking heavy recognizances from the parties, and forwarding a copy of the report or other record for the immediate orders of the civil court,) the investigation of suits for dispossession, in which they may be concerned.

It is true that by Regulation VII. of 1799, Sudder Malguzars are vested with the right of attaching on the institution of a summary suit for arrears, under tenures of defaulters of all descriptions—and by Regulation VIII. of 1819, whether the defaulter may have been arrested or not; but then, whereas by the first enactment, more extended powers of annulment were granted to Sudder Malguzars, on the continuance of an arrear, or after obtaining a summary decree; by the latter, they are declared to have the power of cancelling *limited intermediate interests* only, between themselves and the ryuts, and I maintain, that the Sudder Malguzar would not be justified in cancelling the tenure of a Mourusi Talukdar without the authority of the civil court.

In all cases of Talukdarry and ryutty tenures, the magistrate would be able to see at a glance whether the case should be entered upon by him or otherwise; if the Sudder Malguzar is dispossessing with the authority of the court or under the implied sanction of the law, a reply put in to that effect, or a reference to the court, will at once stay further proceedings. It is clear too, that many other cases might occur in which dependent

Talukdars; for instance, those denominated Jungleboori and Putnee, and even Paikashto ryuts might be wrongfully dispossessed, by an infringement of the period and conditions of their leases.



In the cases of *Khoodkashto ryuts ;* the court would seem to have overlooked the 5th clause of Section 18, Regulation VIII. of 1819, which enacts, that the tenures of resident and hereditory ryuts *cannot be attached or cancelled for arrears :* such arrears shall be recoverable by process of arrest, distraint, or summary suit, but should the arrear be adjudged due at the end of the year, and not be paid, they may be otherwise disposed of by the authority of the court to the exclusion of the defaulter. Thus these tenures are legally voidable only under the permission and sanction of the Dewanny Adawlut.

These remarks, it is to be observed, have reference to disputes for possession between Sudder Malguzars in their *general capacity,* and their under-tenantry, in one and the same estate. *Their special powers* as purchasers at public sales may be seen on a reference to Head IV. of chapter 2*.

Any discussion of these matters, any attempt at classification under this head, serves to exhibit more forcibly the extreme difficulty of the subject, as well as the necessity for consolidating and re-enacting the regulation law. The predicaments in which Regulation XV. of 1824, applies, should be most distinctly specified, and a regulation should be prepared, (or it might be included in the uniform body of law referred to in the introduction, and preliminary remarks to Chapter 1,) declaring the relative rights—1*st*, of Sudder proprietors—2*ndly*, of Talukdars and middlemen; 3*rdly*, of ryuts,—*as contained in the regulations at present in force.*

* See pp. 122-4.

THE END.